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THE TWENTY-NINTH YEAR OF THE WORLD COURT *

BY MANLEY O. HUDSON

The twenty-ninth year of the Court at The Hague was marked by sustained and fruitful activity. Two judgments were handed down in the *Colombian-Peruvian Case Relating to Asylum*, and four advisory opinions were given at the request of the General Assembly of the United Nations. Proceedings in the Franco-Egyptian Case on *Protection of French Nationals in Egypt* were discontinued. At the close of the year four cases were on the Court's list: the *Anglo-Norwegian Fisheries Case*, the *Rights of American Nationals in Morocco Case*, a second *Colombian-Peruvian Asylum Case*, and a request for an advisory opinion concerning *Reservations to the Genocide Convention*. The progress registered during the year in the extension of the Court's jurisdiction was disappointingly slight.

COMPETENCE OF THE GENERAL ASSEMBLY FOR ADMISSION OF A STATE TO THE UNITED NATIONS

On November 22, 1949, the General Assembly of the United Nations adopted a resolution requesting the Court to give an advisory opinion on the following question:

Can the admission of a State to membership in the United Nations, pursuant to Article 4, paragraph 2, of the Charter, be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend?

The request, duly transmitted to the Registry,¹ was notified to states entitled to appear before the Court. On December 2, 1949, the Court issued an order fixing January 24, 1950, as the date of expiry of the period during which written statements would be received.² Statements were made within the time-limit by the Byelorussian Soviet Socialist Republic, Czechoslovakia, Egypt, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, and the United States of America; statements later made by the Republic of Argentina and Venezuela were accepted by a decision of the President of the Court. The Secretary General of the United Nations also submitted a written statement, setting forth the his-

* This is the twenty-ninth in the writer's series of annual articles on the World Court, the publication of which was begun in this JOURNAL, Vol. 17 (1923), p. 15.

¹ A list of the numerous documents submitted with the request was annexed to the opinion.

² I. C. J. Reports, 1949, pp. 241-242.

torical background of the question.³ An oral statement was made before the Court by M. Georges Scelle on behalf of the Government of the French Republic on February 16, 1950.

The opinion of the Court, adopted by twelve votes to two and handed down on March 3, 1950, gave a negative answer to the question before it.⁴ Dissenting opinions were given by Judges Alvarez and Azevedo. The Court deemed itself competent to give the opinion, under Article 96 of the Charter and Article 5 of its Statute, despite the contention to the contrary in some of the statements placed before it.

Analyzing the question before it, the Court thought itself

called upon to determine solely whether the General Assembly can make a decision to admit a State when the Security Council has transmitted no recommendation to it.

Under Article 4 (2) of the Charter, both a "recommendation" by the Security Council and a "decision" by the General Assembly are required to effect the admission of a state to membership in the United Nations. "Both these acts are indispensable to form the judgment of the Organization," the Security Council's recommendation being a "condition precedent" to the decision of the General Assembly. As a principle of interpretation, the Court said that

the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.

As effect could be given to the words in Article 4 (2) in their "natural and ordinary meaning," the Court concluded that no resort should be had to *travaux préparatoires*.

In their dissenting opinions, Judge Alvarez favored an affirmative answer to the question put to the Court, and Judge Azevedo favored such an answer where seven members of the Security Council had voted for the applicant state.

The answer to the question placed before the Court in this case seems so obvious that one may doubt whether the General Assembly was justified in making its request. If its action is to be attributed to the recommendation which it had adopted on November 14, 1947,⁵ this is another indication of the questionable wisdom of the policy followed at that time.

³ These statements are reproduced in Document Distr. 50/17.

⁴ I. C. J. Reports, 1950, pp. 4-57; this JOURNAL, Vol. 44 (1950), p. 582.

⁵ See this JOURNAL, Vol. 42 (1948), p. 17.

PROTECTION OF FRENCH NATIONALS AND PROTECTED PERSONS IN EGYPT

This proceeding between France and Egypt was instituted by the Government of the French Republic by an application filed with the Registry of the Court on October 13, 1949.⁶ M. Jean Rivière, Ambassador at The Hague, was designated as the French Agent; Iskander Bey El Wahhabi, Minister at The Hague, designated as the Egyptian Agent, was later replaced by his successor as Minister, Mohammed Ali Sadek Bey.

On several occasions the French Agent requested a postponement of the convocation of the Agents by the President of the Court for the purpose of fixing the time-limits for the written proceedings; and no order concerning time-limits was issued.⁷

By a letter of February 21, 1950, the French Agent informed the Registrar that in view of the revocation by the Egyptian Government of certain measures referred to in the French application, the French Government renounced further procedure in the case and requested that the case be removed from the Court's list. The Court took the view that by appointing its Agent the Egyptian Government had "already taken some step in the proceedings," and that for this reason Article 69 (2) of the Rules of Court required a time-limit to be fixed within which the Egyptian Government as respondent might oppose the discontinuance of the proceedings; the time-limit was fixed to expire on March 22, 1950. No opposition having been expressed by the Egyptian Government, on March 29, 1950, the Court issued an order placing the discontinuance on record and removing the case from the Court's list.⁸

INTERPRETATION OF PEACE TREATIES WITH BULGARIA, HUNGARY AND
RUMANIA

The above rubric, bestowed on this case in the publications of the Court, may be slightly misleading. The interpretation requested was confined solely to those articles of the three Peace Treaties which are concerned with the settlement of disputes.

On October 22, 1949, the General Assembly of the United Nations adopted a resolution, by which it decided to submit the following questions to the Court for an advisory opinion:

I. Do the diplomatic exchanges between Bulgaria, Hungary and Rumania, on the one hand, and certain Allied and Associated Powers signatories to the Treaties of Peace on the other, concerning the implementation of Article 2 of the Treaties with Bulgaria and Hungary and Article 3 of the Treaty with Rumania, disclose disputes subject to

⁶ The text of the application is reproduced in the Pleadings, Oral Arguments, Documents relating to the case, p. 8. See also this JOURNAL, Vol. 44 (1950), pp. 22-23.

⁷ The writer regrets an error, due to misinformation, in reporting the issuance of such an order in this JOURNAL, Vol. 44 (1950), p. 24.

⁸ I. C. J. Reports, 1950, pp. 59-60.

the provisions for the settlement of disputes contained in Article 36 of the Treaty of Peace with Bulgaria, Article 40 of the Treaty of Peace with Hungary, and Article 38 of the Treaty of Peace with Romania?

In the event of an affirmative reply to Question I:

II. Are the Governments of Bulgaria, Hungary and Romania obligated to carry out the provisions of the Articles referred to in Question I, including the provisions for the appointment of their representatives to the Treaty Commissions?

In the event of an affirmative reply to Question II and if within thirty days from the date when the Court delivers its opinion, the Governments concerned have not notified the Secretary-General that they have appointed their representatives to the Treaty Commissions, and the Secretary-General has so advised the International Court of Justice:

III. If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties?

In the event of an affirmative reply to Question III:

IV. Would a Treaty Commission composed of a representative of one party and a third member appointed by the Secretary-General of the United Nations constitute a Commission, within the meaning of the relevant Treaty articles, competent to make a definitive and binding decision in settlement of a dispute?

First Phase

On November 7, 1949, notice of the request was given by the Registry to all states entitled to appear before the Court and such states which were parties to the Treaties of Peace were specially informed that the Court was prepared to receive written statements on the questions. In pursuance of the provision in Article 68, Article 63 (1) of the Statute was applied by analogy, and identical notes were sent to Bulgaria, Hungary and Rumania, though they are not within the category of states entitled to appear before the Court.

On November 7, also, the Acting President of the Court issued an order fixing January 16, 1950, as the date of expiry of the time-limit for the submission of written statements.⁹ Within this time-limit, statements were submitted by the United States of America, the United Kingdom, Bulgaria, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Byelorussian Soviet Socialist Republic, Rumania, Czechoslovakia, Australia and Hungary.

In the oral proceedings, conducted from February 28 to March 2, 1950, the Court heard oral statements by Ivan Kerno on behalf of the Secretary

⁹ I. C. J. Reports, 1949, pp. 229-231.

General of the United Nations, Benjamin V. Cohen on behalf of the United States, and G. G. Fitzmaurice on behalf of the United Kingdom.

The Court's advisory opinion giving affirmative replies to Questions I and II, adopted by eleven votes to three, was handed down on March 30, 1950.¹⁰ A separate opinion, in reality a dissent, was given by Judge Azevedo, and dissenting opinions were given by Judges Winiarski, Zoričić and Krylov.

Objection to the Court's exercise of its advisory function in this case was advanced by Bulgaria, Hungary and Rumania, and such exercise was challenged in the statements submitted by certain other states. The objection was founded on three arguments. The first argument was that the General Assembly acted *ultra vires* in making the request, because of Article 2 (7) of the Charter relating to non-intervention in matters which are essentially within the domestic jurisdiction of a state. To this the Court replied that the questions before it related neither to the alleged violations of human rights provisions of the Treaties, nor to the interpretation of those provisions. They related, instead, to the applicability of the procedure for settlement of disputes provided for in the Treaties, a matter which is not essentially within the domestic jurisdiction of a state.

The second argument was that the exercise of the Court's advisory procedure would take the place of the procedure instituted by the Treaties for the settlement of disputes. The Court's reply was that its procedure would place no obstacle to, but would facilitate, the procedure provided for in the Treaties.

The third argument was more substantial; it was contended that the Court could not give an opinion on the questions before it without the consent of the three opposing states, Bulgaria, Hungary and Rumania. This was supported by arguments based on the Court's explanation of its refusal to give an advisory opinion in the *Eastern Carelia Case* in 1923. That case was discussed at some length in the dissenting opinions of Judges Winiarski, Zoričić and Krylov, but the Court dismissed it with a single sentence, stating that "the circumstances of the present case are profoundly different from those" which were before the Court in the *Eastern Carelia Case*, and explaining the conclusions reached in the latter. One may wish that the Court had dealt more completely with the *Eastern Carelia Case*, in order that it may not plague the Court in its exercise of advisory jurisdiction in the future.

No opinion was given in the *Eastern Carelia Case*; instead the Court sent a "reply" to the Council of the League of Nations stating its reasons for declining to give an opinion. Strangely, this reply was published in the official *Collection of Advisory Opinions*,¹¹ when it ought to have been published in some other manner. For this reason, reference was made to it as an "advisory opinion" in some of the opinions in this case.

¹⁰ I. C. J. Reports, 1950, pp. 65-119; this JOURNAL, Vol. 44 (1950), p. 742.

¹¹ Series B, No. 5. See also 1 Hudson, World Court Reports, p. 190.

The writer has long held the view that the Court's explanation of its refusal to give an opinion in the *Eastern Carelia Case* in 1923 was unfortunate. Having before it a request by the Council of the League of Nations for an opinion on a question involved in a dispute between Finland and Russia, and confronted with the latter's protest advanced at a time when it was not a Member of the League of Nations, the Court declared that the case was "one under Article 17 of the Covenant." This in itself was doubtful. The Court then added that the "rule" of Article 17 "accepts and applies a principle which is a fundamental principle of international law," and it proceeded to formulate the principle as "well established in international law" that

no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.¹²

As this statement was connected with the Court's reference to Article 17 of the Covenant, one may doubt whether the significance of the formulation was duly appreciated. It would be a serious handicap to efforts to preserve the peace of the world if the bodies which have the principal responsibility for such efforts could have the guidance of the Court's advisory opinions on legal issues arising in the promotion of pacific settlement of disputes only when all parties to the dispute give their consent. Article 11 of the Covenant proclaimed that any war or threat of war was a matter of general concern, and the same principle is implicit in the Charter of the United Nations, particularly in Article 1 (1). Once it is admitted that there is a general interest in the maintenance of peace, it must follow that a general interest exists, also, in the pacific settlement of international disputes. Requests to the Court for advisory opinions which have no binding force may be found to be a useful way of asserting that general interest, and the consent of all parties to a dispute should not be required as a condition precedent to the Court's honoring such requests.

This was appreciated by the Council of the League of Nations when it received the Court's "reply" in 1923. On September 27, 1923, the Council entered the following *caveat* to the Court's explanation of its refusal to give an opinion:

The Council feels sure that the opinion expressed by the Court in connection with the procedure described by Article 17 of the Covenant could not exclude the possibility of resort by the Council to any action, including a request for an advisory opinion from the Court, in a matter in which a State non-Member of the League and, unwilling to give information, is involved, if the circumstances should make such action necessary to enable the Council to fulfil its functions under the Covenant of the League in the interests of peace.¹³

¹² Series B, No. 5, p. 27.

¹³ League of Nations Official Journal, 1923, pp. 1336-1337, 1501-1502.

The Court proceeded in 1923 to give "other cogent reasons which render it very inexpedient" for it to give an opinion. It doubted whether there would be available materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact involved. This in itself was ample justification for the refusal to give an opinion; and it alone should have been put forward as the reason for that refusal. The Court then added the doubtful statement that "answering the question would be substantially equivalent to deciding the dispute between the parties."

To return to the present case, Question I involved two points. It was first necessary for the Court to say whether the diplomatic exchanges referred to disclosed the existence of any disputes. This was thought to be "a matter for objective determination." The United Kingdom (acting in association with Australia, Canada and New Zealand) and the United States of America had charged Bulgaria, Hungary and Rumania with having violated the provisions of the human rights articles of the Treaties of Peace, and the governments of the three states had denied the charges. Thus "the two sides held clearly opposite views." Confronted with this situation the Court concluded that disputes were disclosed to exist between the states which had made the charges and the three states against which the charges had been made.

The second point involved was whether the disputes disclosed fell within the category of disputes as to which the procedure for setting up Treaty Commissions was applicable. The Court had no doubt that the disputes concerned "the interpretation or execution" of the Treaties, inasmuch as they related to the performance or non-performance of the obligations provided for in the Treaties dealing with human rights and fundamental freedoms. It concluded, therefore, that the disputes disclosed by the diplomatic correspondence were subject to the provisions for the settlement of disputes contained in the Peace Treaties.

By Question II the Court was invited to say whether the governments of Bulgaria, Hungary and Rumania were "obligated to carry out the provisions of the Articles referred to in Question I," including those relating to the Treaty Commissions. Giving greater precision to the question, the Court stated that "the articles referred to in Question I" meant only those articles providing for the settlement of disputes. Hence the real meaning of Question II was:

Are Bulgaria, Hungary and Romania obligated to carry out, respectively, the provisions of Article 36 of the treaty with Bulgaria, Article 40 of the treaty with Hungary, and Article 38 of the treaty with Romania? ¹⁴

¹⁴ The three articles read as follows:

"1. Except where another procedure is specifically provided under any article of the present Treaty, any dispute concerning the interpretation or execution of the Treaty, which is not settled by direct diplomatic negotiations, shall be referred to the Three Heads of Mission acting under Article 35, except that in this case the

Direct negotiations had failed to settle the disputes in question; these disputes had not been resolved by the heads of missions; nor had other means of settlement been agreed upon by the parties. The Court noted also that after the expiry of the prescribed period the United Kingdom and the United States had requested that the disputes be settled by the commissions mentioned in the Treaties. In these circumstances, the Court found that "all the conditions required for the commencement of the settlement of the disputes had been fulfilled." As the reference to a commission was to be made "at the request of either party," it followed that each party to a dispute was obligated, at the request of the other party, to coöperate in constituting the commission, "in particular by appointing its representatives."

Second Phase

By the General Assembly's resolution of October 22, 1949, the Court was asked to give an opinion on Question III only if within thirty days from the date when the Court delivers its affirmative opinion on Question II, "the Governments concerned have not notified the Secretary-General that they have appointed their representatives to the Treaty Commissions, and the Secretary-General has so advised the Court." This provision in the General Assembly's resolution did not impose on Bulgaria, Hungary and Rumania a legal duty to notify the Secretary General of any appointments; it merely stated a contingency upon which the Court was asked to reply to Question III, and if this reply was in the affirmative, to Question IV.

The thirty days from the date when the Court delivered its opinion elapsed on April 29, 1950. On May 1, 1950, the Secretary General notified the Court that he had not received notice that any one of the three governments had appointed its representative to the Treaty Commissions.

On May 5, 1950, the President of the Court issued an order fixing June 5, 1950, as the date of expiry of the time-limit for the submission of written statements on Questions III and IV.¹⁵ A statement was submitted on behalf of the United States of America within that time-limit; the statement previously submitted by the United Kingdom in the first phase of the case had dealt with Questions III and IV. On June 27 and 28, 1950, the Court

Heads of Mission will not be restricted by the time-limit provided in that Article. Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment.

"2. The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding."

¹⁵ I. C. J. Reports, 1950, pp. 121-123.

heard oral statements on behalf of the Secretary General of the United Nations, the United Kingdom and the United States.

On July 18, 1950, the Court handed down its opinion, adopted by eleven votes to two, giving a negative reply to Question III.¹⁶ Dissenting opinions were written by Judges Read and Azevedo.

The issue in Question III was stated by the Court to be

whether the provision empowering the Secretary-General to appoint a third member of the Commission applies in the present case, in which one of the parties refuses to appoint its own representative to the Commission.

There had been "refusals" by Bulgaria, Hungary and Rumania to appoint their representatives on the Treaty Commissions in the summer of 1949. Yet the General Assembly resolution seems to have envisaged a possibility of such appointments' being made in the interim of thirty days after the Court's affirmative replies to Questions I and II, and during this period of thirty days there was no fresh refusal to appoint. Even after the expiration of the thirty days, it continued to be possible that appointments would be made. Judge Read found "no reason for assuming that governments now in default would continue in default if faced with appointments by the Secretary General."

The Court stressed the point that the Secretary General was to appoint a "third" member of each Treaty Commission. It found that the parties to the Treaties contemplated a sequence of events, in which the appointment of both national commissioners was to precede the appointment of a *third* member, and it refused to reverse this "normal order of appointment." This conclusion was buttressed by a somewhat doubtful argument that in the circumstances an appointment of a third member by the Secretary General "would result only in the constitution of a two-member Commission," and not "the constitution of a three-member Commission such as the Treaties provided for." It is difficult to see that the appointment of a third member would amount to the *constitution* of any commission; it might have been regarded only as a *step toward* constituting a three-member commission. Here the Court was in reality anticipating a negative answer to Question IV, though the request for such an answer was conditioned upon an affirmative reply to Question III. The fact that two members would not constitute a commission "competent to make a definitive and binding decision in settlement of a dispute," hardly justifies the rigid insistence on a time-table of sequence for which the Treaties did not expressly provide. It seems to be going too far to say that the refusal of Bulgaria, Hungary and Rumania to appoint national commissioners had "deprived the appointment of the third member by the Secretary General

¹⁶ I. C. J. Reports, 1950, pp. 221-261; this JOURNAL, Vol. 44 (1950), p. 752.

of every purpose." Judge Read's refutation of this view carries great persuasion.

The negative answer given by the Court to Question III precluded it from proceeding to answer Question IV, for the General Assembly's resolution asked for an opinion on Question IV only "in the event of an affirmative reply to Question III." In his dissenting opinion, Judge Read rejected an interpretation leading to a negative answer to Question IV. Yet as the parties to the Treaties had envisaged a decision by a majority of a three-member commission, it is difficult to see how a two-member commission would have been "competent to make a definitive and binding decision in settlement of a dispute." It was quite clearly "the duty of the Court to interpret the Treaties, not to revise them."

Some of the issues in this case might have had a capital importance for the development of the law of arbitral procedure. It is unfortunate, however, that the issues arose with reference to provisions in the Peace Treaties which are cast in such terms as to throw doubt upon the seriousness with which the parties sought an effective system of arbitral procedure. The method laid down for constituting the Treaty Commissions left to the parties themselves a wide latitude. Moreover, no integrated system was introduced for dealing with possible disputes. The fact that a separate commission was envisaged for each pair of disputants was not calculated to produce a uniform interpretation of the identical provisions in the three multipartite Treaties. For example, a commission dealing with a dispute between the United States and Bulgaria might reach a result at variance with that reached by a commission dealing with a dispute between the United Kingdom and Bulgaria with reference to the interpretation of the same treaty provisions. If such provisions for the settlement of disputes have failed to produce results, the parties to the Treaties, not the Court, are responsible for the failure.

In a telegram addressed to the President of the General Assembly and the Secretary General on October 13, 1950, the Rumanian Government challenged the authority of the Court's opinion

because the Court, acting in violation of the principles of law and of its own jurisprudence, has taken upon itself the right to express an opinion on a question concerning Romania, without the Romanian Government's consent.¹⁷

The Hungarian and Bulgarian governments took similar positions in telegrams of October 18 and 28, 1950.¹⁸

By a resolution of November 3, 1950, the General Assembly took note of the Court's replies to the questions put to it.

¹⁷ U. N. Doc. A/1443, Oct. 16, 1950.

¹⁸ U. N. Docs. A/1450 and A/1469, Oct. 19 and 30, 1950.

INTERNATIONAL STATUS OF SOUTH WEST AFRICA

On December 6, 1949, the General Assembly adopted a resolution¹⁹ recalling its previous resolutions concerning the territory of South West Africa adopted on December 14, 1946, November 1, 1947, and November 26, 1948, and declaring it "desirable that the General Assembly, for its further consideration of the question, should obtain an advisory opinion on its legal aspects." The General Assembly decided, therefore, to submit the following questions to the International Court of Justice, with a request that an advisory opinion be "transmitted to the General Assembly before its fifth regular session, if possible":

What is the international status of the Territory of South West Africa and what are the international obligations of the Union of South Africa arising therefrom, in particular:

- (a) Does the Union of South Africa continue to have international obligations under the Mandate for South West Africa and, if so, what are those obligations?
- (b) Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to the Territory of South West Africa?
- (c) Has the Union of South Africa the competence to modify the international status of the Territory of South West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?

The request was filed in the Registry of the Court on December 27, 1949. On December 30, 1949, the President issued an order fixing March 20, 1950, as the date of expiry of the time-limit for the submission of written statements by governments.²⁰ Such statements were submitted within the time-limit by Egypt, the Union of South Africa, the United States of America, India and Poland.

The Board of Directors of the International League for the Rights of Man having asked permission to submit written and oral statements on the question, the Court decided on March 16, 1950, to receive from it a written statement on the legal issues involved, if filed before April 10; no statement was filed by that date, however.²¹

At public sittings held from May 16 to May 23, 1950, the Court heard oral statements on behalf of the Secretary General of the United Nations, the Government of the Philippines and the Government of the Union of South Africa.

¹⁹ In the additional resolution 337 (IV) of Dec. 6, 1949, the General Assembly expressed its regret that the Union of South Africa had withdrawn its "previous undertaking" to submit reports for the information of the United Nations.

²⁰ I. C. J. Reports, 1949, pp. 270-271.

²¹ The writer is in possession of a printed statement of 33 pages on behalf of the International League for the Rights of Man.

The Court's opinion was announced on July 11, 1950.²² Separate opinions were given by Judges McNair and Read, and dissenting opinions were given by Judges Alvarez, de Visscher and Krylov.

While the Court had deemed it unnecessary to consider separately the general introductory question before it, the reply was given to this question that "South West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17, 1920."²³ The Court looked upon the Mandate as creating a "new international institution," which had "only the name in common with the several notions of mandate in national law." Hence it refused "to draw any conclusions by analogy" from such notions.

As to Question (a), the Court adopted, by twelve votes to two, the following reply:

that the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South-West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted, and the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court.

It was admitted by the Court, however, that

Some doubts might arise from the fact that the supervisory functions of the League with regard to mandated territories not placed under the new Trusteeship System were neither expressly transferred to the United Nations nor expressly assumed by that organization.

The supervisory functions of the League of Nations were based upon Article 22 of the Covenant and Article 6 of the Mandate for South West Africa. Article 22 (7) required each Mandatory to render to the Council an annual report in reference to the mandated territory, and Article 22 (9) provided for a permanent commission to receive and examine the annual reports and to advise the Council on all matters relating to the observance of the Mandates. Article 6 of the Mandate required the Mandatory to make to the Council "an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed" in certain articles of the Mandate. The Court took the view that the obligation to submit to such supervision did not disappear when the Council of the League of Nations ceased to exist.

²² I. C. J. Reports, 1950, pp. 128-219; this JOURNAL, Vol. 44 (1950), p. 757.

²³ The text of the Mandate is reproduced in 1 Hudson, *International Legislation*, pp. 57-60; also in this JOURNAL, Supp., Vol. 17 (1923), p. 175.

To support its additional conclusion that the Union of South Africa is obliged to submit to the supervision of, and to render annual reports to, the United Nations, the Court relied upon a resolution adopted by the final Assembly of the League of Nations on April 18, 1946, which was said to presuppose "that the supervisory functions exercised by the League would be taken over by the United Nations." This is hardly borne out by the text of the resolution, however.²⁴ Nor is the succession of the General Assembly a necessary consequence of its competence under Article 10 of the Charter to which the Court refers.

The Court referred to an "innovation" by which "the supervisory function of the Council was rendered more effective." This was the resolution adopted by the Council of the League of Nations on January 31, 1923, by which the Council decided that a certain "procedure shall be adopted in respect of petitions regarding inhabitants of mandated territories."²⁵ No reference was made to the power which the Council of the League of Nations must have had to change the procedure, or to abolish it altogether. Yet the establishment of this procedure was found to have bestowed a "right" on the inhabitants of South West Africa, and the right "which the inhabitants of South West Africa had thus acquired" was found to have been "maintained" by Article 80 (1) of the Charter. The Court proceeds to say that the "dispatch and examination of petitions form a part" of the supervision to be exercised by the United Nations, concluding that the Government of the Union of South Africa is obliged to transmit petitions to the General Assembly of the United Nations.

The Court referred in some detail to action taken by the Government of the Union of South Africa. In a declaration to the Assembly of the League of Nations, that government stated its intention to continue to administer the territory in accordance with the obligations of the Mandate; and to regard such obligations as not diminished by the dissolution of the League, even though that fact would "necessarily preclude complete compliance." In declarations made to the United Nations, that government had stated its intention to render reports to the United Nations, though a contrary intention was later expressed. These declarations give scant support to the Court's conclusion that the Mandatory has an obligation to render reports to the General Assembly.

²⁴ The resolution provided in part that the Assembly:

"3. Recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;

"4. Takes note of the expressed intentions of the Members of the League now administering territories under Mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers" (League of Nations Official Journal, Spec. Supp. No. 194, pp. 278-279).

²⁵ League of Nations Official Journal, 1923, pp. 211, 300.

The Court seems to have placed emphasis on the competence of the General Assembly to exercise supervision and to receive and examine reports. Such competence can hardly be doubted. Yet it does not follow from the conclusion that the General Assembly "is legally qualified to exercise the supervisory functions previously exercised by the League of Nations," that the Union of South Africa is under an obligation to submit to supervision and control by the General Assembly, or that it is obligated to render annual reports to the General Assembly.

Having concluded that the supervisory functions of the Council of the League of Nations have devolved upon the General Assembly of the United Nations, the Court found it necessary to state a qualification. It said that

South West Africa is still to be considered as a territory held under the Mandate of December 17, 1920. The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations.

It was added that "these observations are particularly applicable to annual reports and petitions." As the Council of the League of Nations was free to change its procedure at any time, the restriction may tend to freeze a procedure which experience would not justify.

Article 80 (1) of the Charter seems to be the principal basis of the Court's conclusion that the Union of South Africa must report to the General Assembly. This article provided that, until the conclusion of Trusteeship Agreements, nothing in Chapter XII of the Charter should "be construed *in or of itself* to alter *in any manner the rights whatsoever of any states or any peoples* or the terms of existing international instruments" (italics supplied). The text clearly shows an intention that Chapter XII should not effect any alteration of rights or terms. This intention was "entirely negative in character." The provision served an obvious purpose when Chapter XII of the Charter was drawn up: the Mandate was still in force at that time; as the League of Nations had not then been dissolved, any alteration of the existing situation was a matter for its consideration. Article 80 (1) was a precautionary provision designed to negative the accomplishment of any change in the existing situation by reason of Chapter XII "in or of itself." It is not surprising that Judge McNair found it "difficult to see the relevance of this article."

Yet the Court gave an affirmative effect to Article 80 (1), turning it into a positive "safeguard" for maintaining the rights of states and the rights of the peoples of the mandated territory. This is the more notable because at a later stage the Court stressed the "entirely negative" character of Article 80 (2), declining to say that the latter imposed a positive obligation on the Mandatory even to negotiate with a view to the conclusion of a Trusteeship Agreement.

No attention was paid by the Court to the fact that certain states, which as Members of the former League of Nations may have "rights" under Article 22 of the Covenant and under the Mandate itself, had no responsibility for the Charter and have never become Members of the United Nations. For example, Finland, Ireland and Portugal, which were represented at the final session of the Assembly of the League of Nations in 1946, are in this category. If their rights are "maintained" by Article 80 (1) of the Charter, they have no voice in the supervision to be exercised by the General Assembly.

The replacement of the reference to the Permanent Court of International Justice in paragraph 2 of Article 7 of the Mandate²⁶ by a reference to the International Court of Justice, raises some interesting questions. In the formal *dispositif* of its opinion, the Court referred to this replacement as "in accordance with Article 7 of the Mandate and Article 37 of the Statute." In discussing the question, however, it referred also to Article 80 (1) of the Charter, stating that, having regard to Article 37 of the Court's Statute and Article 80 (1) of the Charter,

the Court is of opinion that this clause in [Article 7 (2) of] the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions.

This must mean that certain other states may invoke jurisdiction of the Court,²⁷ and that in this sense they have a "right."

Article 37 of the Court's Statute, as amended in 1945, effected replacement of the Permanent Court by the International Court of Justice only "as between the parties to the present Statute." Does Article 80 (1) of the Charter, which is said to have "maintained" the rights of states and the terms of existing international instruments, overcome this limitative provision in Article 37 of the Court's Statute? Only if this be the case is the second paragraph of Article 7 of the Mandate maintained in its entirety, so as to preserve the "rights" of states which are not parties to the 1945 Statute to invoke the Court's compulsory jurisdiction. As Article 37 of the Statute alone substitutes the International Court of Justice for

²⁶ This paragraph reads as follows:

"The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted [Fr., *soit soumis*] to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations. . . ."

²⁷ Perhaps it may be thought that in consequence of the introductory words in Article 7 (2) of the Mandate—"The Mandatory agrees"—the South African Union itself cannot invoke the Court's jurisdiction against the other states; in approving the Mandates, the Council of the League of Nations did not have power to bind all Members to accept the Court's jurisdiction.

the Permanent Court of International Justice, it would seem that greater weight should be given to it than to Article 80 (1). The conclusion of Judge Read seems a necessary one, therefore, that

in the case of Members [of the League of Nations] that did not become parties to [the Statute of] this Court, their right to implead the Union before the Permanent Court lapsed.

On this view it would follow that Article 80 (1) of the Charter did not effectively "maintain" all of the "rights *whatsoever*" of states. Perhaps the language used in the *dispositif* of the opinion—"the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice"—is therefore too broad. In neglect of the limitation in Article 37 of the Court's Statute, it would mean that Article 7 of the Mandate, which is still in force, would read somewhat as follows:

The Mandatory agrees that if any dispute should arise between the Mandatory and any State which was a Member of the former League of Nations, relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall [may] be submitted to the International Court of Justice.

A question may arise, also, as to the precise meaning of the phrase "another Member of the League of Nations," in Article 7 (2) of the Mandate. Judge McNair expressed the view that this expression is "descriptive, not conditional," and that it does not mean *so long as the League exists and they are Members of it*. Yet what states does it describe? Does the phrase mean another state which was a Member of the League of Nations on December 17, 1920? If so, Brazil would be included, though it withdrew from the League of Nations in 1923, and Egypt and Mexico would be excluded because they were admitted to the League of Nations at later dates. Does the phrase now mean another state which was a Member of the League just prior to its dissolution? Judge McNair seems to have been willing to give it this import. Yet some states in this category—for example, Portugal, whose territory borders on South West Africa—may not now be "States entitled to appear before the Court." In any event, the meaning is so imprecise that perhaps the Court might have shown more hesitance in declaring the replacement to be made in the second paragraph of Article 7 of the Mandate.

The first part of Question (b) gave no difficulty, and the Court was unanimous in its reply

that the provisions of Chapter XII of the Charter are applicable to the Territory of South-West Africa in the sense that they provide a means by which the Territory may be brought under the Trusteeship System.

The second part of Question (b), as to the "manner" in which Chapter XII is applicable, was taken to refer to the question

whether the Charter imposes upon the Union of South Africa an obligation to place the territory under the Trusteeship System by means of a Trusteeship Agreement.

This phrasing of the question was somewhat limiting, and it gave such difficulty that the bench was sharply divided with reference to it. By eight votes to six, the Court replied:

that the provisions of Chapter XII of the Charter do not impose on the Union of South Africa a legal obligation to place the Territory under the Trusteeship System.

The Court took the view that the language of Articles 75 and 77 of the Charter is permissive.²⁸ Both of these articles refer to subsequent agreements, and in the view of the Court "the parties must be free to accept or reject the terms of a contemplated agreement." The principle derived from these articles is not overridden by the fact that the term "voluntary" was employed only in Article 77 (c).

The provision in Article 80 (2) of the Charter²⁹ was said to be "entirely negative in character," though it is little more so than that in Article 80 (1) to which the Court gave a positive effect. In the view of the Court, Article 80 (2) does not impose on Mandatory states "a duty to negotiate and conclude Trusteeship Agreements," nor does it create "an obligation to enter negotiations with a view to concluding Trusteeship Agreements."

It is to this latter point that Judge de Visscher's dissenting opinion, in which Vice President Guerrero and Judges Zoričić and Badawi Pasha concurred generally, was addressed. Judge de Visscher interpreted Article 80 (2) as "a direction" to the Mandatories "to be ready, at the earliest opportunity, to negotiate with a view to concluding such agreements."

²⁸ Article 75 reads: "The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories."

Article 77 reads:

"1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

"a. territories now held under mandate;

"b. territories which may be detached from enemy states as a result of the Second World War; and

"c. territories voluntarily placed under the system by states responsible for their administration.

"2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms."

²⁹ Article 80 (2) reads: "Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77."

He insisted that in interpreting provisions which "create a well-defined international regime," the endeavor must be "to reconcile the texts rather than to set them in opposition to one another." Reconciling the permissive provisions of Articles 75, 77 and 79, with Article 80 (2), he concluded that though a Mandatory remains "free to reject the particular terms of a proposed agreement," it has a "legal obligation to be ready to take part in negotiations and to conduct them in good faith with a view to concluding an agreement." In Judge de Visscher's view, the international system created by the Charter "would never have had more than a theoretical existence" if the Mandatories did not have such obligations. A similar obligation had been found by the Court to exist in the *Railway Traffic between Lithuania and Poland Case*, in 1931;³⁰ it was then declared that the obligation to negotiate did not "imply an obligation to reach an agreement."

The Court stated that the Charter "contemplated and regulated only a single system, the International Trusteeship System. It did not contemplate a co-existing Mandates System." Yet, as pointed out by Judge Krylov, "the Court's answer to the second part of Question (b) may prolong the co-existence of the Mandate System and the Trusteeship System."

The Court was unanimous in replying to Question (c) that

the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South-West Africa, and that the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations.

Article 7 (1) of the Mandate provided that "the consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate." The Court noted that this brought into operation "the same organ which was invested with powers of supervision in respect of the administration of the Mandates." Its finding that the powers of supervision "now belong to the General Assembly" seems a slender basis for its conclusion that the United Nations (not simply the General Assembly of the United Nations) is substituted for the Council of the League of Nations as the body which must consent to a modification of the international status of South West Africa. A somewhat stronger reason for the conclusion is that the Union of South Africa itself seems to have taken the same view. While Judge McNair thought that with the disappearance of the Council of the League of Nations "the effect of the first paragraph of Article 7 of the Mandate has now lapsed," he found a basis for the

³⁰ P. C. I. J., Series A/B, No. 42, p. 116. In that case, the parties had accepted a recommendation of the Council of the League of Nations "to enter into direct negotiations as soon as possible." It is not without interest that some national legislation—for example, that of the United States—imposes a duty on employers and employees in certain cases to exert every reasonable effort to make agreements.

Court's conclusion in the resolution adopted by the Assembly of the League of Nations in 1946.

If one finds some difficulty in following the reasoning offered by the Court for its conclusion that the United Nations is the successor to the League of Nations with respect to the latter's supervisory functions under the "Mandate System," he may nevertheless be gratified that the Court was able to build a bridge of historical continuity between the League of Nations and the United Nations. The conclusion is hardly consistent with the caution manifested by the General Assembly itself in its resolution of February 12, 1946, concerning the transfer to the United Nations of certain functions of the League of Nations.³¹ In that resolution it was stated that

the General Assembly will itself examine, or will submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character.

Nor can the historical continuity be said to have been a moving *desideratum* with most of the statesmen who labored in the Conference at San Francisco in 1945; they were actuated rather by a desire for a decided break with the experience of the past, and this disposition left unfortunate traces in the Charter. All the better it would seem to be, if the Court, acting as in this case within the bounds of judicial restraint, can escape some of the consequences of their limited vision.

The Court's opinion was considered at some length by the Fourth Committee at the fifth session of the General Assembly, and on December 13, 1950, the General Assembly resolved to accept the opinion and to urge the Government of the Union of South Africa to take the necessary steps to give effect to it.

✓ COLOMBIAN-PERUVIAN ASYLUM CASE

This proceeding was instituted on October 15, 1949, by an application by the Colombian Government. Reference was made in the application to the Act of Lima of August 31, 1949, in which the Governments of Colombia and Peru had agreed that proceedings might be instituted on the application of either party "without this being regarded as an unfriendly act." Colombia was represented before the Court by Professor J. M. Yepes as Agent, and by Alfredo Vasquez as Advocate; Peru was represented by Carlos Sayán Alvarez as Agent, with the assistance of Felipe Tudela y Barrera, Fernando Morales Macedo R. and Juan José Calle y Calle, and by Professor Georges Scelle and Julio López Oliván as Counsel.

³¹ Resolutions adopted by the General Assembly, First Sess., Pt. I, Jan. 10-Feb. 14, 1946, p. 35.

Availing themselves of the privilege accorded by Article 31 (3) of the Statute, each of the parties designated a Judge *ad hoc*; José Joaquín Caicedo Castilla was designated to serve in this capacity by Colombia, and Luis Alayza y Paz Soldán by Peru. Oral proceedings in the case were held on September 26-29, and October 2-9, 1950. In the course of the oral proceedings, the final submissions of the parties were formulated. The counter-claim advanced by Peru in its counter-memorial was amended during the oral proceedings by the addition of a request for a ruling on the maintenance of the asylum at the present time. Colombia asked the Court to adjudge and declare:

I.—That the Republic of Colombia, as the country granting asylum, is competent to qualify the offence for the purpose of the said asylum, within the limits of the obligations resulting in particular from the Bolivarian Agreement on Extradition of July 18th, 1911, and the Havana Convention on Asylum of February 20th, 1928, and of American international law in general;

II. —That the Republic of Peru, as the territorial State, is bound in the case now before the Court to give the guarantees necessary for the departure of M. Víctor Raúl Haya de la Torre from the country, with due regard to the inviolability of his person.

On the Peruvian counter-claim, Colombia submitted:

1. That the counter-claim presented by the Peruvian Government on March 21st, 1950, is not admissible because of its lack of direct connexion with the Application of the Colombian Government;

2. That the new counter-claim, irregularly presented on October 3rd, 1950, in the form of a submission upon allegations made during the oral debate, is not admissible on the grounds that:

- (a) It was presented in violation of Article 63 of the Rules of the Court;
- (b) The Court has no jurisdiction to take cognizance of it;
- (c) It has no direct connexion with the Application of the Colombian Government.

Peru asked the Court

To set aside submissions I and II of the Colombian Memorial.

To set aside the submissions which were presented by the Agent of the Colombian Government at the end of his oral statement on October 6th, 1950, in regard to the counter-claim of the Government of Peru, and which were repeated in his letter of October 7th, 1950; and to adjudge and declare

As a counter-claim, under Article 63 of the Rules of Court and in the same decision, that the grant of asylum by the Colombian Ambassador at Lima to Víctor Raúl Haya de la Torre was made in violation of Article 1, paragraph 1, and of Article 2, paragraph 2, item 1 (*inciso primero*), of the Convention on Asylum signed in 1928, and that in any case the maintenance of the asylum constitutes at the present time a violation of that treaty.

A military rebellion which took place in Peru on October 3, 1948, was suppressed on the same day. On the following day, a state of siege was declared, suspending certain constitutional rights; and the President of Peru issued a decree, charging the American People's Revolutionary Alliance, the "Aprista Party," with responsibility for the rebellion, declaring that this party had placed itself outside the law, and stating that its leaders would be brought to justice in the national courts. On October 11, an examining magistrate issued an order opening proceedings against Víctor Raúl Haya de la Torre and others, for the crime of military rebellion; the detention of such persons was later ordered. On November 16 and on each of the two following days, a public summons was published in the official gazette, *El Peruano*, requiring the accused persons to report to the magistrate to answer the accusation of the crime of military rebellion.

About 9:00 p.m. on January 3, 1949, Haya de la Torre, a Peruvian national who had been a leader of the "Aprista Party," sought and was granted asylum in the Colombian Embassy in Lima. On the following day, the Colombian Ambassador informed the Peruvian Minister for Foreign Affairs and Worship of his action, and requested a safe-conduct to enable Haya de la Torre to leave the country. On January 14, 1949, the Ambassador informed the Minister that in accordance with Article 2 of the Convention of Montevideo of December 26, 1933, the Government of Colombia had qualified Haya de la Torre "as a political refugee." No safe-conduct having been granted, the extension of the asylum was continued.

The first judgment of the Court was given on November 20, 1950.³² By fourteen votes to two, it rejected the first submission of Colombia, insofar as it involved a right for Colombia to qualify the nature of the offense by a unilateral and definitive decision binding on Peru. The Court admitted that a diplomatic representative was competent to make "a provisional qualification of any offence alleged to have been committed by the refugee," but stated that such a qualification could be contested by the territorial state. Here Colombia claimed competence to make a qualification by a unilateral and definitive decision binding on Peru.

The Colombian Government had invoked Articles 4 and 18 of the Bolivarian Agreement on Extradition of 1911.³³ Article 4 dealt with extradition, a matter which the Court distinguished from "diplomatic asylum," because the latter involves "a derogation from territorial sovereignty." In Article 18 of the Agreement the parties had recognized "the institution of asylum in conformity with the principles of international law"; the Court stated that these principles "do not recognize any rule of unilateral and definitive qualification by the State granting diplomatic asylum."

³² I. C. J. Reports, 1950, p. 266; this JOURNAL, below, p. 179.

³³ Colombia, *Tratados, Convenciones y Acuerdos aprobados por el Congreso Nacional de 1918*, p. 15; Peru, *2 Tratados, Convenciones y Acuerdos vigentes* (1936), p. 162.

Colombia also invoked the Havana Convention on Asylum of 1928;³⁴ but the Court could find no provision in that Convention "conferring on the State granting asylum a unilateral competence to qualify the offence with definitive and binding effect for the territorial State." Nor was such a competence "inherent in the institution of diplomatic asylum."

The Montevideo Convention on Political Asylum of 1933³⁵ was also invoked by Colombia. Article 2 of this Convention provides that the judgment of political delinquency concerns the state which offers asylum. As Peru had not ratified the Montevideo Convention, the Court said it could not be invoked against Peru. Colombia contended, however, that this Convention merely codified principles "already recognized by Latin-American custom," and that it was valid against Peru "as a proof of customary law"; this argument was made in connection with Colombia's reliance on "American international law in general." The Court noted that only a limited number of states, "not more than eleven," had ratified the Montevideo Convention. With regard to the actual practice of American States, the Court stated that the facts brought to its knowledge disclosed

so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions of asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.

The Court was therefore unable to find that the Colombian Government had proved the existence of the custom contended for.

With respect to Colombia's second submission, asserting the obligation of Peru to give guarantees for the departure of Haya de la Torre, the Court's analysis of Article 2 (4) (item 3) of the Havana Convention³⁶ led to the conclusion that Peru was bound to grant a safe-conduct only after it

³⁴ 132 League of Nations Treaty Series, p. 323; 4 Hudson, International Legislation, p. 2412; this JOURNAL, Supp., Vol. 22 (1928), p. 158. When this Convention was adopted by the Sixth International Conference of American States in 1928, the Delegation of the United States made an "explicit reservation" that "the United States does not recognize or subscribe to as part of international law, the so-called doctrine of asylum." *Ibid.*, p. 159. Ratifications of the Convention were deposited by fourteen American states, including Colombia and Peru.

³⁵ 6 Hudson, International Legislation, p. 607; this JOURNAL, Supp., Vol. 23 (1934), p. 70.

³⁶ Article 2 (4) (item 3) provides: "The Government of the State may require that the refugee be sent out of the national territory within the shortest time possible; and the diplomatic agent of the country who has granted asylum may in turn require the guaranties necessary for the departure of the refugee with due regard to the inviolability of his person, from the country."

had exercised the option to require the departure of the refugee from Peru. As Peru had not requested the departure, it had no duty to give a safe-conduct. By fifteen votes to one, therefore, Colombia's second submission was rejected.

In its original counter-claim, Peru sought a declaration that asylum had been given to Haya de la Torre in violation of provisions in the Havana Convention of 1928. The Court first dealt with this original counter-claim without regard to the addition made in the course of the oral proceedings. The counter-claim was intended to put an end to the dispute. The Court observed that it did not raise "the question of the possible surrender of the refugee to the territorial authorities," that this question had not been raised in the proceedings before the Court, and that in fact Peru had not requested a surrender of the refugee.

The admissibility of the counter-claim was contested by Colombia on the ground that it was "not directly connected with the subject-matter of the Application." The Court could not accept this view. The counter-claim disputed the regularity of the asylum, and Colombia's demand for a safe-conduct rested largely on that regularity. A direct connection was "thus clearly established."

Concerning the expression "the grant of asylum" employed in the counter-claim, the Court said:

The grant of asylum is not an instantaneous act which terminates with the admission, at a given moment, of a refugee to an embassy or legation. Any grant of asylum results in, and in consequence logically implies, a state of protection; the asylum is granted as long as the continued presence of the refugee in the embassy prolongs this protection.

Peru first invoked in support of its counter-claim Article 1 (1) of the Havana Convention, which excludes the grant of asylum "to persons accused or condemned for common crimes." But the Court thought that Peru had failed to prove that the acts of which Haya de la Torre was accused before January 3/4, 1949, constituted common crimes. On this point, the counter-claim was rejected by the Court by fifteen votes to one.

Article 2 (2) (item 1) of the Havana Convention, put forward as a second basis of the counter-claim, provides that "asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety." The Court viewed the conditions prescribed as "designed to give guarantees to the territorial State," and as serving "as the consideration for the obligation which that State assumes to respect asylum."

The essential justification for asylum was declared to be "the imminence or persistence of a danger for the person of the refugee." The circumstances that during a period of several months Haya de la Torre had apparently been in hiding, had refused to obey the summons of the legal

authorities, and had not followed the example of several of his co-accused in seeking diplomatic asylum, made it *prima facie* "difficult to speak of urgency" in this case. Colombia had advanced, however, a "danger of political justice by reason of the subordination of the Peruvian judicial authorities to the instructions of the Executive." In reply, the Court said that it had not been shown that the existence of a state of siege implied such subordination. In principle, "asylum cannot be opposed to the operation of justice," though it "protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents." The Court rejected the argument

that the Havana Convention was intended to afford a quite general protection of asylum to any person prosecuted for political offences, either in the course of revolutionary events, or in the more or less troubled times that follow, for the sole reason that it must be assumed that such events interfere with the administration of justice.

As to the numerous cases of asylum cited by Colombia, the Court found it difficult to assess their value as precedents tending to establish a legal obligation. In general, territorial states have for reasons of convenience or simple political expediency recognized the asylum, without feeling bound by a legal obligation.

The Court found that "on January 3rd/4th, 1949, there did not exist a danger constituting a case of urgency" under Article 2 (2) (item 1) of the Havana Convention. It added, however, that "this finding implies no criticism of the Ambassador of Colombia." The Court found also that under the circumstances the asylum had been prolonged for a reason not recognized in Article 2 (2) of the Convention.

These findings called for the allowance of the original counter-claim of Peru. It was therefore unnecessary for the Court to consider the addition submitted by Peru during the oral proceedings, "that in any case the maintenance of the asylum constitutes at the present time a violation of the treaty." This addition had been intended as a substitution for the counter-claim in its original form if the latter were rejected, and it disappeared when the counter-claim was allowed.

The Court's final conclusion, adopted by ten votes to six, was that the grant of asylum by the Colombian Government was not made in conformity with Article 2, paragraph 2 (item 1) of the Havana Convention.

The dissenting opinions by Judges Alvarez, Badawi Pasha, Read and Azevedo, and by Judge *ad hoc* Caecedo, dealt chiefly with the question of urgency.

After the rendition of the Court's judgment and on the same day³⁷ the

³⁷ According to a despatch appearing in the New York Times in the early morning of Nov. 20, 1950, somewhat accurate forecasts as to the contents of the judgment seem to have been current at The Hague on the day before the judgment was announced.

Colombian Agent addressed a letter to the Registrar stating that under Article 60 of the Statute and Articles 79 and 80 of the Rules of Court, the Colombian Government requested an interpretation of the judgment. This request sought the Court's answer to three questions:

First.—Must the Judgment of November 20th, 1950, be interpreted in the sense that the qualification made by the Colombian Ambassador of the offence attributed to M. Haya de la Torre, was correct, and that, consequently, it is necessary to attribute legal effect to the above-mentioned qualification, in so far as it has been confirmed by the Court?

Second.—Must the Judgment of November 20th, 1950, be interpreted in the sense that the Government of Peru is not entitled to demand the surrender of the political refugee M. Haya de la Torre, and that, consequently, the Government of Colombia is not bound to surrender him even in the event of this surrender being requested?

Third.—Or, on the contrary, does the Court's decision on the counter-claim of Peru imply that Colombia is bound to surrender the refugee Víctor Raúl Haya de la Torre to the Peruvian authorities, even if the latter do not so demand, in spite of the fact that he is a political offender and not a common criminal, and that the only convention applicable to the present case does not order the surrender of political offenders?

This request was treated as introducing a fresh proceeding in the case.

On November 20, 1950, the Colombian request was communicated to the Agent of Peru, whose reply of November 22 contended that the request was inadmissible. On November 24, 1950, the Agent of Colombia stated in a communication to the Court that the main purpose of the request for interpretation was

to obtain a declaration stating whether, in rejecting the Peruvian counter-claim "as far as it is founded on a violation of Article 1, paragraph 1, of the Convention on Asylum signed at Havana in 1928," it was the Court's intention to say that Colombia is not bound to surrender M. Haya de la Torre to the Peruvian authorities.

In a judgment adopted by twelve votes to one and announced on November 27, 1950, the Court declared the request for interpretation to be inadmissible.³⁸ Article 60 of the Statute was held to lay down two conditions for admissibility of such a request, and neither of the conditions was met in this case.

The first condition is that the purpose of a request for interpretation must be to obtain a clarification of the meaning and the scope of what the Court has decided with binding force:

It is the duty of the Court not only to reply to the questions as stated in the final submission of the parties, but also to abstain from deciding points not included in those submissions.

³⁸ I. C. J. Reports, 1950, p. 395. Judges Zoričić, Badawi Pasha and Azevedo did not participate in this phase of the case.

The three questions posed in the Colombian request related to questions which had not been placed before the Court and which the Court had not decided. The object of these questions was to obtain "a decision on questions which the Court was not called upon by the Parties to answer."

The second condition in Article 60 requires the existence of a "dispute as to the meaning or scope of the judgment." No such dispute existed in this case. The mere facts that one party found the judgment obscure, and that the other deemed it to be perfectly clear, did not create a dispute. The Court added that "the very date of the Colombian Government's request for interpretation shows that such a dispute could not possibly have arisen in any way whatever."

SECOND COLOMBIAN-PERUVIAN ASYLUM CASE

On November 28, 1950, the Government of Peru requested that Haya de la Torre be surrendered to its custody. On December 6, 1950, the Government of Colombia replied that it did not consider itself bound to comply with this request.

On December 13, 1950, the Colombian Minister to The Netherlands filed an application with the Registry of the Court, instituting a new proceeding against Peru. To establish the jurisdiction of the Court, the application invoked, in addition to Articles 36 and 37 of the Statute of the Court, the Protocol of Friendship and Coöperation between Colombia and Peru, signed at Rio de Janeiro on May 24, 1934, ratifications of which were exchanged on September 27, 1935.³⁹ The application requested the Court "to determine the manner in which effect shall be given to the judgment of November 20, 1950"; and particularly to state whether Colombia is, or is not, bound to deliver the refugee to the Government of Peru. Alternatively, in the event that the above claim should be dismissed, it asked the Court to adjudge "whether, in accordance with the law in force between the Parties and particularly American international law, the Government of Colombia is, or is not, bound to deliver M. Víctor Raúl Haya de la Torre

³⁹ Art. 7 of this Protocol provides: "Colombia and Peru solemnly bind themselves not to make war on each other nor to employ force, directly or indirectly, as a means of solving their present problems or any others that may arise hereafter. If in any eventuality they fail to solve such problems by direct diplomatic negotiations, either of the High Contracting Parties may have recourse to the procedure established by Article 36 of the Statute of the Permanent Court of International Justice, nor may the jurisdiction of the Court be excluded or limited by any reservations that either Party may have made when subscribing to the Optional Clause.

"*Sole sub-section.* In this case, when judgment has been delivered, the High Contracting Parties undertake to concert means of putting it into effect. Should they fail to reach an agreement, the necessary powers shall be conferred upon the Permanent Court, in addition to its ordinary competence, to make effective the judgment in which it has declared one of the High Contracting Parties to be in the right." 164 League of Nations Treaty Series, p. 21.

to the Government of Peru." The application also contained a declaration that the Colombian Government would be prepared to accept a decision *ex aequo et bono* if the Government of Peru agreed; the view was expressed that as Article 7 of the Protocol of Rio de Janeiro did not provide for such jurisdiction, Colombia could not make this request unilaterally. The texts of the Peruvian request of November 28, and the Colombian reply of December 6, 1950, were annexed to the application.

Time-limits for the filing of documents of the written proceedings were fixed by the President's order of January 3, 1951. /

ANGLO-NORWEGIAN FISHERIES CASE

The proceedings in this case were instituted by an application by the United Kingdom, communicated to the Registry of the Court on September 28, 1949. Time-limits for the submission of the United Kingdom memorial, the Norwegian counter-memorial, the United Kingdom reply and the Norwegian rejoinder were fixed by the Acting President's order of November 9, 1949.⁴⁰

By a letter of March 7, 1950, the Norwegian Agent requested that the time-limit for the presentation of the counter-memorial be extended from May 31, 1950, to July 31, 1950. The British Agent stated that he did not object to this request provided that it be granted only subject to the condition that if judgment in the case should not be given before the opening of the third fishing season [apparently the third season after the institution of the proceedings], the impugned Norwegian decree of 1935 should not be applied beyond certain lines. By an order of March 29, 1950, the Court granted the extension requested by Norway unconditionally, observing that the condition proposed by the Agent of the United Kingdom "could be satisfied only by resorting to the procedure appropriate thereto." By an order of October 4, 1950, the time-limits for the reply and the rejoinder were extended, the latter to expire on January 31, 1951.⁴¹ It is to be anticipated that oral proceedings may be begun by the summer of 1951.

RIGHTS OF AMERICAN NATIONALS IN MOROCCO

On October 28, 1950, the Government of the French Republic transmitted to the Court an application instituting a proceeding against the United States with reference to a dispute growing out of the Dahir issued by the Shereefian Government of Morocco on December 30, 1948. To establish the jurisdiction of the Court, the applicant invoked the declarations under Article 36 (2) of the Statute recognizing the Court's compulsory jurisdiction, made on behalf of the United States on August 26, 1946, and on behalf of France on February 18, 1947. Yet the parties to the dispute seem

⁴⁰ I. C. J. Reports, 1949, pp. 234-235. See this JOURNAL, Vol. 44 (1950), p. 22.

⁴¹ I. C. J. Reports, 1950, pp. 62, 263. The time-limit was later extended.

to have been in accord upon the action taken by the French Government. A translation of the application was released to the press by the Department of State in Washington on the day before the application was presented to the Court, and at that time it was stated by the Department that "the United States is committed to submit to the compulsory jurisdiction of the Court in cases of this type."⁴²

By the Dahir of December 30, 1948, the Shereefian Government adopted measures, in pursuance of an exchange control régime established in 1939, subjecting to license certain imports which did not involve an official allocation of currency, and limiting such imports to a number of products. The application stated that the Government of the United States had claimed that these measures affected, in an essential point, American rights under its treaties with Morocco, and had contended that no Moroccan law or regulation could be applied to American nationals in Morocco without its previous consent, reliance being placed on the Treaty of September 16, 1836, between the United States and the Emperor of Morocco, and on the General Act of Algeciras of April 7, 1906. A provisional and temporary agreement had been concluded by the United States and France on September 4, 1949, modified and extended on December 31, 1949;⁴³ but the application stated that in a note of October 3, 1950, the United States had indicated an intention to denounce the agreement. The position taken by the Government of the United States may have been due to a provision in the Foreign Aid Appropriation Act, 1950 (P. L. 759), approved by the President on September 6, 1950, that "after November 1, 1950, no funds herein appropriated shall be made available to any nation of which a dependent area fails in the opinion of the President to comply with any treaty to which the United States and such dependent area are parties."⁴⁴

The French Government asked the Court to declare:

That the privileges of the nationals of the United States of America in Morocco are only those which result from the text of Articles 20 and 21 of the Treaty of September 16th, 1836, and that, since the most-favoured-nation clause contained in Article 24 of the said treaty can no longer be invoked by the United States in the present state of the international obligations of the Shereefian Empire, there is nothing to justify the granting to the nationals of the United States of preferential treatment which would be contrary to the provisions of the treaties;

That the Government of the United States of America is not entitled to claim that the application of all laws and regulations to its nationals in Morocco requires its express consent;

That the nationals of the United States of America in Morocco are

⁴² Press Release No. 1111, of Oct. 27, 1950.

⁴³ Department of State Bulletin, Vol. 22, No. 550 (Jan. 16, 1950), p. 98.

⁴⁴ The Department of State announced on Oct. 27, 1950, that in view of the application being made to the Court, the President had decided to make no determination regarding compliance with treaties until the decision of the Court had been given.

subject to the laws and regulations in force in the Shereefian Empire, and in particular the regulation of December 30th, 1948, on imports not involving an allocation of currency, without the prior consent of the United States Government;

That the *Dahir* of December 30th, 1948, concerning the regulation of imports not involving an allocation of currency, is in conformity with the economic system which is applicable to Morocco, according to the conventions which bind France and the United States.

The French Republic designated André Gros as its Agent, and Adrian S. Fisher was named as Agent of the United States.

By an order of November 22, 1950, the Court fixed time-limits for the presentation of the documents of the written proceedings, the latest being November 1, 1951.

RESERVATIONS TO THE GENOCIDE CONVENTION

The Genocide Convention opened to signature by the General Assembly on December 9, 1948, was brought into force as a result of the deposit of ratifications on or before October 14, 1950,⁴⁵ by Australia, Ecuador, El Salvador, Ethiopia, France, Guatemala, Haiti, Iceland, Israel, Liberia, Norway, Panama, Philippines and Yugoslavia, and the deposit of accessions⁴⁶ by Bulgaria, Cambodia, Ceylon, Costa Rica, Jordan, Korea, Monaco, Saudi Arabia, Turkey and Viet-Nam.

Reservations to Articles IX and XII were made at the time of signature of the Convention by the Soviet Union, Byelorussia, Ukraine and Czechoslovakia;⁴⁷ these states have not proceeded to deposit their ratifications. In its ratification deposited on July 7, 1950, the Republic of the Philippines made reservations to Articles IV, VI, VII and IX of the Convention; the Bulgarian accession to the Convention deposited on July 21, 1950, contained reservations to Articles IX and XII. Objections to some or all of these reservations were expressed by Australia, Ecuador and Guatemala, states which deposited ratifications.

On October 14, 1950, the Secretary General drew up a *procès-verbal* of the deposit of ratifications as provided for in Article XIII, the purpose of which was to fix the date from which "the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession" on which the Convention should enter into force, was to be counted. It was unnecessary at that time to assess the legal force of the Bulgarian and

⁴⁵ The Convention has effect from January 12, 1951. For text of Convention and reservations see Supplement to this JOURNAL, p. 7.

⁴⁶ Under a resolution of the General Assembly of Dec. 3, 1949, invitations to sign or accede to the Convention were extended to each non-member of the United Nations which is or may become an active member of a specialized agency or a party to the Court's Statute. Under Art. XI of the Convention, all of the nineteen non-member states which received such an invitation were permitted to accede after January 1, 1950.

⁴⁷ For text of reservations see this JOURNAL, Vol. 44 (1950), p. 128.



Philippine reservations, as twenty-two ratifications or accessions without reservations had been deposited when the *procès-verbal* was drawn up.⁴⁸

On November 16, 1950, the General Assembly adopted a resolution requesting the Court to give an advisory opinion on the following questions:

In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification:

- I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?
- II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving State and:
 - (a) The parties which object to the reservation?
 - (b) Those which accept it?
- III. What would be the legal effect as regards the answer to question I if an objection to a reservation is made:
 - (a) By a signatory which has not yet ratified?
 - (b) By a State entitled to sign or accede but which has not yet done so?

By an order of December 1, 1950,⁴⁹ the President of the Court fixed January 20, 1951, as the date of expiry of the time-limit for the submission of written statements on these questions; and a willingness was indicated to receive statements from the states invited to sign the Genocide Convention, as well as from the International Labor Organization and the Organization of American States.

PARTIES TO THE COURT'S STATUTE

On March 29, 1950, the Principality of Liechtenstein deposited with the Secretary General its accession to the Statute of the Court on the conditions set by the General Assembly on December 1, 1949. The declaration of accession reads as follows:

The Government of the Principality of Liechtenstein, duly authorized by His Serene Highness, the Reigning Prince François Joseph II, in accordance with the Order of the Diet of the Principality of Liechtenstein dated 9 March 1950, which came into force on 10 March 1950,

⁴⁸ The Secretariat of the United Nations deserves an accolade for its ingenuity in arranging for the simultaneous deposit of five ratifications or accessions on Oct. 14, 1950, thus obviating a delicate question.

⁴⁹ I. C. J. Reports, 1950, p. 406.

Declares by these presents that, in order to become a party to the Statute of the International Court of Justice dated 26 June 1945, the Principality of Liechtenstein accepts the three conditions laid down by the General Assembly of the United Nations in a resolution of 1 December 1949, to wit:

- (a) that it accepts the provisions of the said Statute;
- (b) that it accepts all the obligations of a Member of the United Nations under Article 94 of the Charter of the United Nations of 26 June 1945;
- (c) that it undertakes to contribute to the expenses of the International Court of Justice such equitable amount as the General Assembly of the United Nations shall assess from time to time after consultation with the Government of the Principality of Liechtenstein.

Switzerland, also a non-member of the United Nations, had previously acceded to the Statute on the same conditions.

The Republic of Indonesia became a party to the Statute by reason of its admission to membership in the United Nations on September 28, 1950.

Sixty-two states were thus parties to the Statute of the Court at the close of 1950.

DECLARATIONS RECOGNIZING THE COURT'S COMPULSORY JURISDICTION

On June 13, 1950, Thailand renewed, for a period of ten years as from May 3, 1950, its declaration under Article 36 (2) of the Statute, first made in 1929. Only two states made new declarations during the year 1950 under Article 36 (2) of the Court's Statute recognizing the compulsory jurisdiction of the Court. At the time of its accession to the Statute on March 29, 1950, such a declaration was made by Liechtenstein, for an indefinite period subject to termination on one year's notice.

The following declaration, deposited on October 11, 1950, was made on behalf of Israel (translation from the French):

On behalf of the Government of Israel, and subject to ratification, I declare that Israel recognizes as compulsory *ipso facto* and without special agreement, in relation to all other Members of the United Nations and to any non-member State which becomes a party to the Statute of the International Court of Justice pursuant to Article 93, paragraph 2 of the Charter and which accepts the same obligation (that is, subject to reciprocity) the jurisdiction of the International Court of Justice in conformity with Article 36, paragraph 2 of the Statute of the said Court in all legal disputes concerning situations or facts which may arise after the date of deposit of the instrument of ratification of this declaration, and, in particular, which do not involve a legal title created or conferred by a Government or authority other than the Government of the State of Israel or an authority under the jurisdiction of that Government.

This declaration does not apply:

- (a) to any dispute in respect of which the parties have agreed or shall agree to have recourse to another means of peaceful settlement;
- (b) to any dispute relating to matters which are essentially within the domestic jurisdiction of the State of Israel;
- (c) to any dispute between the State of Israel and another State which refuses to establish or maintain normal relations with it.

The present declaration has been made for five years as from the date of deposit of the instrument of ratification.

No ratification of this declaration had been deposited down to the end of 1950.

The thirty-four declarations now in force recognizing the Court's compulsory jurisdiction,⁵⁰ were made by the following states:

*Australia	*Haiti	Pakistan
Belgium	Honduras	*Panama
Bolivia	*India	Philippine Republic
Brazil	*Iran	*El Salvador
*Canada	Liechtenstein	Sweden
China	*Luxembourg	Switzerland
*Colombia	Mexico	*Thailand
Denmark	Netherlands	Turkey
*Dominican Republic	*New Zealand	*Union of South Africa
France	*Nicaragua	*United Kingdom
Guatemala	Norway	United States of America
		*Uruguay

The declarations of sixteen of these states, indicated by asterisks, were made prior to the revision of the Court's Statute in 1945, but they continue in force by reason of the provision in Article 37 of the Statute of the Court.

Few people will find it a satisfactory record that five years after the entry into force of the Charter, declarations by only thirty-two of the sixty Members of the United Nations are in force. A determined effort was made by the delegates of many states at the San Francisco Conference in 1945 to eliminate the optional character of Article 36 (2). Their failure to attain this result was due, chiefly, to the positions taken by the Union of Soviet Socialist Republics and the United States of America. It might have been expected that in the period of five years more of the states engaged in that effort would have exercised the option open to them by the text adopted. The experience of the intervening years has served to em-

⁵⁰ Paraguay is also included in the list published in the Court's Yearbook for 1949-1950, pp. 44, 165. Ethiopia and Greece, as parties to the Geneva General Act of Sept. 26, 1928, have recognized the jurisdiction of the Court provided for in that Act.

blazon the unfortunate failure in 1945 to endow the Court with some compulsory jurisdiction as to all Members of the United Nations.

The revised General Act for the Pacific Settlement of International Disputes, adopted by the General Assembly on April 28, 1949, entered into force on September 20, 1950, in consequence of the deposits of accessions by Belgium (December 23, 1949) and Sweden (June 22, 1950). The previous declarations of these states, made under Article 36 (2) of the Court's Statute, are valid only for limited periods of time.

It is of interest to note that Article 18 of the Convention on the Declaration of Death of Missing Persons, opened for accession on April 6, 1950, contains the following provision for the settlement of disputes:

If a dispute shall arise between Contracting States relating to the interpretation or application of the present Convention, and if such dispute has not been settled by other means, it shall be referred to the International Court of Justice. The dispute shall be brought before the Court either by the notification of a special agreement or by a unilateral application of one of the Parties to the dispute.

JURISDICTION UNDER THE GENOCIDE CONVENTION

The Genocide Convention, brought into force on October 14, 1950, with effect from January 12, 1951, provides in Article IX:

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Insofar as this article provides for the settlement of disputes relating to the interpretation, application or fulfilment (in French, *exécution*) of the Convention, it is a stock provision not substantially unlike that found in many multipartite instruments.

The article goes further, however, in "including" among such disputes "those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III." As no other provision in the Convention deals expressly with state responsibility, it is difficult to see how a dispute concerning such responsibility can be *included* among disputes relating to the interpretation or application or fulfilment of the Convention. In view of the undertaking of the parties in Article I to prevent genocide, it is conceivable that a dispute as to state responsibility may be a dispute as to fulfilment of the Convention. Yet read as a whole, the Convention refers to the punishment of individuals only; the punishment of a state is not adumbrated in any way, and it is excluded from Article V by which the parties undertake to enact punitive legislation. Hence the "responsibility

of a State" referred to in Article IX is not criminal liability.⁵¹ Instead it is limited to the civil responsibility of a state, and such responsibility is governed, not by any provisions of the Convention, but by general international law.

In its ratification of the Convention, the Republic of the Philippines stated that it did not consider Article IX "to extend the concept of State responsibility beyond that recognized by the generally accepted principles of international law." This interpretation is so imperative that the statement of it would seem to have resulted from unnecessary precaution.⁵²

Various reservations have been made to Article IX. At the time of signature of the Convention, the Soviet Union, Ukraine, Byelorussia and Czechoslovakia declined to consider the article as binding insofar as they were concerned, and declared that as regards Article IX they maintained "the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision." A similar position was taken by Bulgaria in reservations made in its accession to the Convention. If this position represents a general view which is not confined to disputes relating to the Genocide Convention, it runs squarely counter to the provision in Article 40 of the Statute permitting the institution of proceedings in certain cases by the application of a single party to a dispute, and it would seriously restrict the rôle of the Court in the interpretation and application of international legislative instruments.

AVAILABILITY OF DOCUMENTS OF WRITTEN PROCEEDINGS

The writer ventures to offer a suggestion with regard to the Court's practice concerning the documents of the written proceedings in contested cases. Cases pending before the Court frequently involve questions of a wide general interest. After a case is disposed of by the Court's rendition of a final judgment, all the documents of the written proceedings—if the case is begun by an application, these will usually consist of a memorial, a counter-memorial, a reply and a rejoinder—as well as the stenographic

⁵¹ In the course of the drafting of the Convention by the Sixth Committee of the General Assembly, the Delegation of the United Kingdom withdrew its proposal to impose criminal responsibility on states (U.N. Doc. A/C.6/236) and supported the imposition of civil responsibility. General Assembly, 3rd Sess., Pt. I, Official Records, Sixth Committee, pp. 428, 440.

⁵² In presenting the Convention for the advice and consent of the Senate on June 16, 1949, the President of the United States endorsed a recommendation by the Acting Secretary of State that such action be taken "with the understanding that article IX shall be understood in the traditional sense of responsibility to another state for injuries sustained by nationals of the complaining state in violation of principles of international law, and shall not be understood as meaning that a state can be held liable in damages for injuries inflicted by it on its own nationals." This understanding was recommended by a subcommittee to the Senate Committee on Foreign Relations on May 23, 1950. In view of the conclusion stated above, no statement of such an understanding would seem to be needed.

records of the oral proceedings, are regularly published in admirable form and are made generally available. Though requested to do so by a party in one case,⁵³ the Court declined to depart from this practice. It seems no exaggeration to say that this established tradition has made the Court, as the writer has frequently expressed it, the best-documented public institution in the world.

Before a judgment is given, however, and as a case progresses through the various stages of the written and oral proceedings, it has been the practice of the Court since its earliest days to regard the documents of the written proceedings⁵⁴ as having a restricted, one may say a confidential, character. They may be made available, by special decision taken after obtaining the views of the parties, to the government of any state which is entitled to appear before the Court; this provision in the Rules is essential in order that a non-party state may decide upon the possibility of intervening under Article 62 or Article 63 of the Statute. Yet the documents are not made available to the general public until after the final judgment has been handed down, not even to qualified members of the legal profession who may request them.⁵⁵

With regard to the general public, the practice may be defended as a salutary one.⁵⁶ It is designed to preclude a trial of a case in the newspapers by writers who may have but slight capacity to appreciate the parties' contentions presented in the documents.⁵⁷ Release generally might give "food for polemics,"⁵⁸ which would produce incomplete and inaccurate impressions of the merits of opposing contentions.

With regard to persons known by the Registry to be qualified jurists, on the other hand, it would seem that with no detriment to the Court the prevailing practice might be relaxed to permit documents to be made available for their private use. Such a person may be interested in a proceeding before a national or international tribunal, the outcome of which would be influenced by the eventual judgment of the Court; or he may be engaged on a scientific level in interpreting to jurists and scholars the activities of the Court. To persons in either category, it may be very helpful to have

⁵³ The Borchgrave Case in 1938.

⁵⁴ As employed here, the term "documents of the written proceedings" does not embrace applications or special agreements.

⁵⁵ The practice is explained in detail in Hudson, *Permanent Court of International Justice, 1920-1942*, pp. 559-560.

⁵⁶ In the Supreme Court of the United States, where proceedings to which States of the United States are parties are not infrequent, "briefs in all cases are made available to the public upon filing, and there is no restriction placed upon the parties as to their release," but due to the limited number of copies available "copies of the briefs are not supplied to persons requesting them until after a case has been decided." Letter of the Clerk, Nov. 9, 1950.

⁵⁷ Such a trial may not be precluded, however. See an editorial on the Colombian-Peruvian Asylum Case published in the *New York Times* on Nov. 19, 1950, the day before the Court's judgment in that case was handed down.

⁵⁸ See Series D, No. 2 (2d addendum), pp. 173-174.

an opportunity to study, in advance of the rendition of a final judgment, the contentions advanced by the parties before the Court. Yet the prevailing practice renders that impossible. Even after the rendition of a judgment, some time must elapse before the documents will be available.⁵⁹

It may be answered that an interested lawyer may obtain copies of the documents directly from the Agents of the parties. Yet not many lawyers will be personally known to the Agents, so as to be able to approach them directly; even where that is the situation, a request to an Agent may not be honored. In the past, Agents have seemed at times to regard themselves as under some restrictions in communicating their documents, in consequence of the Court's practice.

An objection to any relaxation of the prevailing practice may also be made on the practical ground that the Registry may be unable to honor all of the requests received from qualified persons for copies of the documents. The Rules of Court formerly required a party to present fifty copies of its documents; Article 40 of the present Rules leaves the fixation of the number to the President, but the number has not been changed. After the needs of the Judges and the Registry are met, the remaining surplus of copies is somewhat limited. Yet requests for them from qualified persons are not likely to be very numerous, and it is difficult to see why they could not be honored within the limits of the stocks available.

In suggesting that the Court might consider a relaxation of the practice insofar as requests for copies of documents of the written proceedings emanate from qualified persons, the writer would recall the *Chevreau Claim* arbitration between France and Great Britain in 1931. The parties to this case decided that on account of the discussions of the case in the press the award should remain secret for a period of three months after it was handed down, but that after the expiration of that period the text should be made available to persons who practiced in the Peace Palace.⁶⁰

The restrictive practice of the Court with respect to the availability of documents of written proceedings was inaugurated twenty-nine years ago by its first Registrar. A great genius he was, as the writer neglects no opportunity to proclaim; yet perhaps a genius who was given at times to extreme caution. It is at least open to question whether he did not go too far in investing the documents of written proceedings with a quasi-confidential character prior to the rendition of a final judgment.

The possibility of the relaxation suggested may present itself as an opportunity to serve the interests of the Court by making its current work more vital to the legal profession of the world, and by extending the too-limited circle of scientific men who try to inform both jurists and students of the year-to-year progress being made at The Hague.

⁵⁹ In consequence, the writer of this article has been under the handicap of having at hand none of the documents of the written proceedings in the case decided by the Court during the year.

⁶⁰ The ban on publication was lifted in 1932. See the writer's comment in this JOURNAL, Vol. 26 (1932), p. 807.

however unfounded it might be. This position was strengthened by the provisions in Article 6 of the treaty that the inhabitants of the ceded territory "shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution." This would seem to exclude the area west of the Perdido from the cession, because that area was already within the States of Louisiana, Mississippi and Alabama, respectively admitted to the Union in 1812, 1817, and 1819.

It is clear that the main issue involved was "At what date did the United States acquire the territory west of the Perdido?", but on this the Court was divided. Marshall consequently resorted to the device of holding that the question was political and the Court would have to follow Congress, a position which has generally been adhered to with respect to the territorial limits of the United States.¹⁵ It would have been logical for him to hold that the treaty provision confirming land titles was self-executing, as indeed he did hold four years later, but that the treaty applied only to the territory east of the Perdido because the political organs of the Government had decided that the territory to the west of the Perdido had been acquired in 1803 by the Louisiana Purchase. Apparently he did not do this because he was convinced, contrary to the opinion of a majority of the Court, that the explicit reference to West Florida in the treaty of 1819, when read in connection with an attached protocol, modified the earlier position of the political organs of the Government.¹⁶ The King of Spain had made three large grants while the treaty was being negotiated, but by this protocol, which he signed after signature but before ratification of the treaty, he explicitly annulled these grants, one of which was located in the area west of the Perdido. Marshall found it difficult to see why it was felt necessary to annul that grant if it was outside the area ceded by the treaty.¹⁷ This division in the Court on the territorial scope of the cession, and the difficulty of determining the intentions of the political authorities on that matter, induced Marshall to leave to Congress the entire question of determining what titles should be recognized. This course was further suggested by the fact that Congress had in fact set up commissions to ascertain the grants which ought to be confirmed and had confirmed some grants and rejected others.

The political complications involved in this case are obvious. Although laws of Louisiana, Alabama and Mississippi might have been involved, the case concerned primarily a conflict between Congressional action and the treaty. Furthermore, the Supreme Court subsequently held that the clause in question was self-executing. In view of these considerations, it is sub-

¹⁵ Jones v. U. S. (1890), 137 U. S. 202, 212; Wright, Control of American Foreign Relations, pp. 172 ff.

¹⁶ 2 Pet. 313.

¹⁷ The grant involved in the Percheman Case was east of the Perdido and apparently in that case Marshall tacitly accepted the opinion of the majority that that river marked the western limit of the Florida cession of 1819.

Miss. 340 + 50
Perdido
W. H. Jones

mitted that the opinion in *Foster v. Nielson* is of no value for interpreting the relation of a treaty provision concerning individual rights to State legislation. On that question the record of the Supreme Court is clear. Rights protected by treaty overrule conflicting State legislation *ex propria vigore*.

In practice, the doctrine of non-self-executing treaties has been applied only to preserve the constitutional rights of the political organs of the Federal Government—the President, the Congress, and especially the House of Representatives which does not normally participate in treaty-making—in matters which for historical or practical reasons have been considered peculiarly within the competence of these organs. Thus it has been held that treaty provisions which require appropriations can only be executed by Congress. Treaty provisions referring to tariffs, to the use of military forces, to the incorporation and the administration of territories acquired by the United States, to the organization of tribunals, and to the establishment of criminal jurisdiction have usually been regarded as non-self-executing.¹⁸

Treaties can be validly made on matters within (as well as outside) the delegated authority of Congress, and the courts will normally apply them, even to the extent of nullifying earlier Congressional or executive action.¹⁹ But within the limited range of matters referred to, those which are considered “political,” the courts have usually held that execution of the treaty obligation belongs to the political organs of the Federal Government subject, however, to the constitutional obligation of these organs to give full effect to the treaty. According to Secretary of State Livingston,

The Government of the United States presumes that whenever a treaty has been duly concluded and ratified by the acknowledged authorities competent for that purpose, an obligation is thereby imposed upon each and every department of the government, to carry it into complete effect, according to its terms, and that on the performance of this obligation consists the due observance of good faith among nations.²⁰

This had reference to a controversy with France in which the French parliament had failed to make an appropriation to carry out a treaty obligation to the United States, but American legal opinion has held that the argument applies equally to the United States. Thus, Attorney General Cushing held in an opinion of 1854: “A treaty, though complete in itself and the unquestioned law of the land, may be inexecutable without the aid of an act of Congress. But it is the constitutional duty of Congress to

¹⁸ Q. Wright, “The Legal Nature of Treaties,” this JOURNAL, Vol. 10 (1916), p. 719; “Treaties and the Constitutional Separation of Powers in the United States,” *ibid.*, Vol. 12 (1918), pp. 64 ff.; Control of American Foreign Relations, pp. 207 ff., 352 ff.; Moore’s Digest, Vol. 5, pp. 221 ff., 241 ff.; Hackworth’s Digest, Vol. 5, p. 198.

¹⁹ U. S. v. *The Peggy* (1801), 1 Cranch 103; Wright, *op. cit.*, p. 344.

²⁰ Wharton’s Digest, Vol. 2, p. 67.

pass the requisite laws."²¹ Such a duty may not exist if the treaty provision itself explicitly makes execution contingent upon action by Congress²² or by the States.²³ Such provisions often amount merely to recommendations to Congress or to the States, although the terms may be such as to oblige these agencies to act. In any case such provisions are not self-executing.²⁴

The principle of Federal supremacy and the explicit terms of Article 6 of the Constitution make it clear that if a treaty provision establishes obligations of the United States without specification of any particular organ or procedure for carrying it out, courts must apply it in preference to conflicting State legislation. In the absence of explicit provision in the treaty itself, there is no authority for leaving the execution of a treaty to the States on the ground that it is not self-executing.

THE INTERNATIONAL LAW ISSUE

Treaty provisions which do not impose obligations on the parties or which specify organs of execution other than national courts, can be called non-self-executing, but in a different sense from that just discussed. Critics of the California court's decision in the Fujii case seem to imply that the provisions of the Charter of the United Nations dealing with human rights do not impose obligations upon the Members, but merely recommend action by them or by organs of the United Nations, and that consequently they are not self-executing.²⁵

This argument involves consideration of the following questions: Does Article 56 of the United Nations Charter impose obligations upon the Members, including the United States? If so, does the Charter provide organs and procedures for interpreting and enforcing these obligations of such a character as to prevent American courts from doing so? If this is answered negatively, it may be asked: Are the obligations of the United States under the article of a character which American courts can apply?

²¹ 6 Ops. Att. Gen. 291; Moore's Digest, Vol. 5, pp. 230, 370; Wright, this JOURNAL, Vol. 12 (1918), p. 93; Control of American Foreign Relations, pp. 5, 357 ff.; Harvard Research in International Law, Law of Treaties, this JOURNAL, Supp., Vol. 29 (1935), p. 1037. See also opinion of Iredell, J., above, note 12.

²² As did Art. 8 of the Mexican Reciprocity Treaty of 1884 (Moore's Digest, Vol. 5, p. 222) and certain provisions of the Shipowner's Liability Convention of 1936 (Stone, G. J., in *Aguilar v. Standard Oil Co.* (1943), 318 U. S. 724, 738). A number of such treaties are listed in Q. Wright, *Columbia Law Review*, Vol. 20 (1920), p. 122, and Harvard Research, *loc. cit.*, pp. 978 ff.

²³ As did Art. 7 of the treaty of 1853 with France and Art. 4 of the Reciprocity Treaty of 1854 with Great Britain. A number of such treaties are listed in *Columbia Law Review*, Vol. 20, p. 123, and in Harold W. Stoke, *The Foreign Relations of the Federal State* (Baltimore, 1931), pp. 177 ff.

²⁴ Q. Wright, *Control of American Foreign Relations*, pp. 90, 191.

²⁵ Hudson, this JOURNAL, Vol. 44 (1950), p. 543.

These questions suggest that the term "non-self-executing treaties" may have a meaning in international law different from that in American constitutional law. Instead of referring to treaty obligations which are to be enforced by the political organs rather than by the courts, the term may refer to treaty provisions which do not impose obligations upon the parties or which implicitly or explicitly preclude judicial application. Many provisions of the United Nations Charter are of this character. They recommend to organs of the United Nations or to the Members that they consider certain subjects or promote certain purposes. Treaty provisions which define the purposes, procedures or powers of international bodies may imply obligations by the parties not to obstruct the realization of these purposes, to observe these procedures, and to respect the decisions resulting from the exercise of these powers. But normally such provisions are not susceptible of application or enforcement by national courts and may, therefore, be called non-self-executing. United States courts have, for example, refused to pass upon the exercise of their jurisdiction by tribunals established by international agreements to which the United States is a party.²⁶

Article 56 of the Charter in form imposes obligations upon the Members of the United Nations. The word "pledge" implies obligation and the reference to "separate" action as distinct from "joint" action indicates that the Members are individually bound to act "for the achievement" of "universal respect for, and the observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." This construction was accepted without hesitation by the California court in the Fujii case:

The position of this country in the family of nations forbids trafficking in innocuous generalities, but demands that every State in the Union accept and act upon the Charter according to its plain language and its unmistakable purpose and intent. Since the Charter is the supreme law of the land, it becomes necessary to examine its provisions and guarantees and to interpret it in the light in which it was adopted by the participating nations.

The integrity and vitality of the Charter and the confidence which it inspires would wane and eventually be brought to naught by failure to act according to its announced purposes. This nation can be true to its pledge to the other signatories to the Charter only by cooperating in the purposes that are so plainly expressed in it and by removing every obstacle to the fulfillment of such purposes.

A perusal of the Charter renders it manifest that restrictions contained in the Alien Land Law are in direct conflict with the plain terms of the Charter and with the purposes announced therein by its framers. It is incompatible with Article 17 of the Declaration of

²⁶ *Hirota v. MacArthur*, 335 U. S. 876, this JOURNAL, Vol. 43 (1949), p. 170; *Flick v. Johnson*, 174 Fed. (2nd) 983, this JOURNAL, Vol. 44 (1950), p. 187.

Human Rights which proclaims the right of everyone to own property. The Alien Land Law must, therefore, yield to the treaty as the superior authority.

This opinion gains weight from the fact that it was unanimous among the three judges and that it was unanimously reaffirmed on rehearing.²⁷ The court said after rehearing that its reference to the Universal Declaration of Human Rights did not imply that that instrument was a treaty or that it directly imposed an obligation upon the United States, but that, like the address of the President to the Senate also referred to, "it emphasized the purposes and guarantees of the Charter." It also said that the fact that Japan is not a Member of the United Nations does not render its nationals ineligible to the guaranties extended to all persons without exception by the Charter.

That Article 56 imposes obligations on the United States appeared equally clear to four Justices of the Supreme Court who, in concurring opinions in the *Oyama case*,²⁸ invoked this article. The Court held that the California Alien Land Law was contrary to the 14th Amendment, at least insofar as it forbade American-born children of Japanese parents ineligible to naturalization to hold land purchased for them by the parents. Justice Black, joined by Justice Douglas, said in his concurring opinion:

There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?

Justice Murphy, joined by Justice Rutledge, said:

Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

The majority of commentators accept this position,²⁹ but others have objected that the pledge of "separate" action is not "to treat persons under

²⁷ Above, note 1.

²⁸ *Oyama v. California* (1948), 332 U. S. 633, this JOURNAL, Vol. 42 (1948), p. 475.

²⁹ H. Lauterpacht, *International Law and Human Rights* (London, 1950), p. 152, quoting Ben Cohen in the General Assembly, and James Brierly and Georges Scelle in the United Nations International Law Commission (*ibid.*, pp. 154, 159).

their jurisdiction with respect for human rights" but "to promote international cooperation to that end."³⁰ With this construction Article 56 adds little, if anything, to Article 55 and is, therefore, "meaningless and redundant."³¹ Ordinary canons of interpretation oppose a construction leading to that result, and common sense suggests that "separate action in cooperation with the organization" implies, as a minimum, abstention from separate action, such as enforcement of racially discriminating land laws, which would oppose the purposes of the organization. It is difficult, if not impossible, to say that a Member is acting in cooperation with the United Nations "for the achievement" of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion," if its courts are enforcing in its own jurisdiction laws which make such discriminations in respect to matters described as human rights in a formal declaration by the principal organ of the United Nations. It is reasonable to infer from the phrase "in cooperation with the organization" that the Members, in fulfilling their pledge to take "separate action," shall be guided by the purposes stated in the Charter and by the more detailed interpretation of the meaning of those purposes and the appropriate methods for achieving them, which organs of the United Nations have recommended. Consequently, the terms of Article 56 amply support the opinion of the court in the *Fujii* case that the Universal Declaration of Human Rights, while not a treaty, constitutes an authoritative interpretation of the words "human rights and fundamental freedoms" in Articles 55 and 56 of the Charter.

This construction gains strength from the legislative history of Article 56, an article which had no counterpart in the Dumbarton Oaks Proposals. It originated at San Francisco in a proposal that:

All members pledge themselves to take separate and joint action and to cooperate with the Organization and with each other to achieve these purposes.

A threefold pledge for separate action, for joint action, and for cooperation with the Organization was, therefore, clearly stated. Some Members objected, however, and a proposal was made eliminating all but the pledge to cooperate:

All members undertake to cooperate jointly and severally with the Organization for the achievement of these purposes.

This, however, was objected to specifically on the ground that it did not contain the threefold pledge which had been approved in principle. As a result the committee proposed a new draft which was accepted and be-

³⁰ U. N. International Law Commission, Doc. A/CN.4/SR.23, p. 10; Lauterpacht, *op. cit.*, p. 154.

³¹ Hans Kelsen, *The Law of the United Nations* (London, 1950), p. 100.

came Article 56 of the Charter, apparently with the intention of incorporating the threefold pledge, although the draft was less clear than the original proposal:³²

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

Interpretation of this article has been discussed in the United Nations International Law Commission and some differences of opinion have emerged. The Chairman (Hudson) expressed the opinion that the Member States "had merely agreed to promote international cooperation" for the ends stated in Article 55.³³ This conclusion may have been arrived at by assuming that the phrase of Article 56 "in cooperation with the Organization" is identical with the phrase "to cooperate with the Organization." It may, however, have been arrived at by assuming that in referring to "the purposes set forth in Article 55" the "pledge" of Article 56 was "for the achievement" not of "universal respect for, and observance of, human rights," etc., but of "promotion by the United Nations of universal respect for, and observance of, human rights," etc. This interpretation, however, not only makes Article 56 verbally repetitive, but it makes it add nothing to Article 55. The text itself and the history of its drafting suggest an intention to differentiate the two articles. Article 55 imposes an obligation upon the United Nations as a collective entity to promote universal respect for, and observance of, human rights, while Article 56 imposes an obligation upon its Members to take joint or separate action in cooperation with the Organization for the achievement of universal respect for, and observance of, human rights. Certainly, the latter obligation requires Members to see that their organs of government respect and observe human rights in carrying out their normal functions and, therefore, in the United States, where treaties are the supreme law of the land, courts must refuse to apply State or earlier Federal laws which fail to respect or observe these rights and freedoms.)

This construction seems to have been accepted by the majority of the members of the United Nations International Law Commission. Professor Scelle "felt that recognition of fundamental human rights constituted a true legal obligation under positive law," and Professor Brierly thought "It could well be argued that international law today did impose a duty on States to respect the human rights of their nationals."³⁴

³² Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations, Commentary and Documents* (Boston, 1949), pp. 322 ff. Kelsen (*op. cit.*, p. 100), and Hudson (this JOURNAL, Vol. 42 (1948), p. 106) reach a different conclusion by giving excessive weight to the position which the United States urged, but, in the opinion of the present writer, failed to achieve.

³³ Above, note 30.

³⁴ Above, note 29.

Article 2, paragraph 7 of the Charter, which asserts:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . .

has also been invoked to deny the existence of any legal obligations under Article 56. (At the most, however, Article 2 (7) could only interfere with effective measures of enforcement by the United Nations, and could not affect the legal obligations of the Members accepted by the Charter. It may be doubted, however, whether Article 2 (7) limits the competence of the United Nations in respect to human rights in any way. Insofar as Members have assumed international obligations in respect to human rights, the interpretation, application, and enforcement of these obligations have ceased to be a matter essentially within their domestic jurisdiction, and consequently Article 2 (7) is inapplicable. This interpretation has been actually applied in the practice of the United Nations and has been endorsed by commentators. According to Goodrich and Hambro:

The rule of international law that a matter ceases to be within the domestic jurisdiction of a State if its substance is controlled by the provisions of international law, including international agreements, has been accepted.³⁵)

This was the position of the Permanent Court of International Justice in the Tunis Nationality Decrees case dealing with the domestic jurisdiction article of the League of Nations Covenant.³⁶ While this differed somewhat in phraseology from the article in the Charter, the meaning of the concept "domestic jurisdiction" under international law has not been altered.

If, as here contended, Article 56 imposes a "separate" obligation upon the United States, there can be no doubt of the capacity of United States courts to interpret and apply it in first instance. Undoubtedly, the organs of the United Nations are also entitled to interpret the duties of the Members of the United Nations, to define the meaning of human rights and fundamental freedoms, and to establish procedures for promoting universal respect for those rights and freedoms. Such action in some cases, may be obligatory upon, and, in some cases, only recommendatory to, the Members. Insofar as organs of the United Nations have acted, whether by interpretative resolutions, by implementation of procedures of the

³⁵ *Op. cit.*, p. 120. For United Nations practice in regard to the matter, see *ibid.*, pp. 114 ff. and Lauterpacht, *op. cit.*, pp. 166 ff. Kelsen's interpretation of this clause would in large measure eliminate all legal obligations of the Members under the Charter (*op. cit.*, p. 769). Lauterpacht characterizes it as "devastating" and "pessimistic" (*op. cit.*, p. 173).

³⁶ Tunis Nationality Decrees case (1923), 1 Hudson, World Court Reports 156.

Charter, or by achieving acceptance by states of concrete obligations as proposed in the so-called Covenant of Human Rights, the Members, pledged to act in coöperation with the United Nations, are bound to be guided by, or at least to consider, this action. Within that limitation, however, their own national organs, including their courts, are free and, in the case of the United States, because of the constitutional powers of courts already discussed, obliged to construe and apply Article 56 in the normal exercise of their jurisdiction. No provision of the Charter gives United Nations organs an exclusive competence in this field. Members are, therefore, free to follow their normal constitutional practices in regard to the interpretation, application and enforcement of the Charter as a treaty to which they are parties.

In applying Article 56 American courts will naturally utilize not only the canons of treaty interpretation accepted by international law, the evidence to be derived from the history of the San Francisco Conference, and practice under the Charter, but also interpretations, insofar as they are not inconsistent, built up by the extensive jurisprudence of the American courts themselves in dealing with similar provisions in other treaties to which the United States has been a party. In bilateral commercial treaties each party often reciprocally assures nationals of the other party in its territory rights of residence and civil liberties equal to those enjoyed by its own nationals. These treaty provisions vary greatly in the degree in which rights of residence and civil liberties are specified in detail.³⁷ In construing such treaties, American courts have repeatedly said that they are self-executing and that they should be liberally construed. Thus, a Japanese pawnbroker in Seattle was protected against a local ordinance on the basis of a provision in the treaty of 1911 with Japan assuring national treatment to resident Japanese with respect to the right "to carry on trade, wholesale and retail."³⁸ Said Justice Butler for the Supreme Court:

The rule of equality established by the treaty cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands in the same footing of supremacy as do provisions of the constitution and laws of the United States. It operates of itself without the aid of any legislation, State or National, and it will be applied and given authoritative effect by the Courts.

Treaties are to be construed in a broad and liberal spirit and when two constructions are possible, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is preferred.³⁹

³⁷ Art. 1 of the United States treaty with Germany, 1923, is typical. *Trenwith*, U. S. Treaties, etc., Vol. 4, p. 4191.

³⁸ *Redmond*, U. S. Treaties, etc., Vol. 3, p. 2712.

³⁹ *Asakura v. Seattle* (1924), 265 U. S. 332. See also *Jordan v. Tashiro* (1928), 278 U. S. 123; *Hackworth's Digest*, Vol. 5, pp. 256 ff.

American nationals, as well as aliens, have been protected by such treaties. For example, the trademark of an American corporation was protected against adverse legislation in Puerto Rico on the basis of the General Inter-American Trade Mark Convention of 1929, which assured national treatment in respect to trademarks and commercial protection. Said Chief Justice Hughes in *Bacardi v. Domenech*:

This treaty, on ratification, became a part of our law. No special legislation in the United States was necessary to make it effective. . . . The treaty bound Puerto Rico and could not be overridden by the Puerto Rican legislature. . . . According to the accepted canon, we should construe the treaty liberally to give effect to the purpose which animates it. Even when a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred.⁴⁰

In spite of this liberal attitude, courts have sometimes given a narrow construction to treaty provisions in order to permit the operation of State laws favoring American nationals in the enjoyment of special privileges deemed to be within the States' "police power." Fishing, hunting, mining and other utilization of the States' natural resources, employment on public works, engaging in activities affecting public health and security, attendance at public schools, and acquisition of land for agricultural purposes, have sometimes been considered privileges which need not be extended to aliens under national-treatment treaty clauses.⁴¹ This distinction of certain "privileges," which the States of the Union may regulate at discretion, from the "rights" which nationals of foreign states are entitled to enjoy under the treaties has been ostensibly based on the terms of the treaty, but has sometimes seemed rather arbitrary; and the line of distinction built up by judicial interpretation has been by no means certain. Agricultural land-holding, for example, was in 1923 held not to be included among the rights of residence assured by the Japanese treaty of 1911;⁴² but more recent opinions have tended to consider it a "right" in the enjoyment of which racial discrimination is forbidden both by the 14th Amendment and by relevant treaty provisions.⁴³ Undoubtedly, however, certain advantages such as immigration, naturalization, voting, and holding public office can properly be considered "privileges" which no principle of non-discrimina-

⁴⁰ 311 U. S. 150 (1940).

⁴¹ *Compagnie Française v. State Board of Health* (1902), 186 U. S. 380; *Patsone v. Pennsylvania*, 232 U. S. 138, 145; *Heim v. McCall* (1915), 239 U. S. 175, 193; *Terrace v. Thompson* (1923), 263 U. S. 197, 223; Wright, "The Constitutionality of Treaties," this JOURNAL, Vol. 13 (1919), pp. 254 ff.; *Control of American Foreign Relations*, pp. 89 ff.

⁴² *Terrace v. Thompson*, above; Hackworth's Digest, Vol. 5, p. 261.

⁴³ See the *Oyama*, *Masaoka*, and *Fujii* cases, above, notes 28 and 1.

tion in the enjoyment of human rights has extended to all persons equally.⁴⁴ It has been said that "the modern tendency has been to bring about an approximation of the Alien to the citizen in the enjoyment of civil as contrasted with political rights," the latter being regarded as privileges.⁴⁵

In view of these divergencies in American practice, it is fortunate that the courts have before them the Universal Declaration of Human Rights as a guide to the interpretation of Article 56 in the Charter. While not a treaty, the Declaration is of great interpretative value, manifesting the opinion of the United Nations as to the scope of human rights and fundamental freedoms. It is to be observed, however, that some of the human rights defined in the Declaration are not susceptible of judicial cognizance until they are implemented by legislation. Achievement of respect for, and observance of, all the human rights set forth would require governments (1) to abstain from enacting laws which impair a right, as, for instance, laws which discriminate on racial grounds in land-holding; (2) to prevent its agencies and officials from performing acts which impair a right, as, for instance, denial of justice in criminal proceedings or judicial enforcement of racially discriminatory covenants; (3) to enact laws and provide suitable procedures to prevent persons within its jurisdiction from impairing a right, as, for instance, by committing genocide or other offenses against human rights; and (4) to maintain such judicial, regulatory, and operative agencies as may be necessary to give practical effect to a right, as, for instance, social security and educational opportunity.⁴⁶

The last type of action, which is usually necessary to realize the so-called social and economic rights, involves the establishment of administrative organizations and the expenditure of money. The courts cannot assure such rights until national or international legislation has provided services, regulations, and appropriations. Insofar as Article 56 is intended to achieve observance of such rights, it is not self-executing.

The third type of action cannot be taken effectively by the courts until police forces have been provided, criminal offenses and penalties defined, and procedures of enforcement enacted. Courts might exercise a broad criminal jurisdiction to punish individual violations of human rights,⁴⁷ but in the United States it has been held that the Federal courts cannot exercise

⁴⁴ These are not included in the Universal Declaration of Human Rights, although that instrument recognizes the rights of emigration and reentry to one's own country (Art. 13, par. 2); of seeking asylum (Art. 14, par. 1); of freedom from deprivation of nationality or denial of change of nationality (Art. 15, par. 2); of participation in elections and equal access to the public service in one's own country (Art. 21).

⁴⁵ Handbook of Commercial Treaties (United States Tariff Commission, 1923), p. 11.

⁴⁶ "Statement of Essential Human Rights," Committee of American Law Institute, 1944, Comment to Art. 1. *Annals, American Academy of Political and Social Science*, Jan., 1946, p. 18.

⁴⁷ As Federal courts did to punish offenses against the law of nations in the 1790's. *In re Henfield*, Fed. Cas. No. 6360; *U. S. v. Ravara*, Fed. Cas. No. 6122, 2 Dall. 297.

criminal jurisdiction except on the basis of explicit Congressional legislation.⁴⁸ Consequently, insofar as Article 56 is intended to achieve protection of rights against impairment by acts of other individuals, it is not self-executing.

Courts can, however, contribute to observance of the first two types in the normal exercise of their jurisdiction. They can refuse to apply laws, to enforce contracts or to follow procedures which violate human rights. By applying Article 56 of the Charter in this manner, national courts, working from precedent to precedent, can contribute to achieving universal respect for, and observance of, human rights and fundamental freedoms. In the same way American courts, in applying the 14th Amendment, have done much to achieve respect for, and observance of, Constitutional guaranties within the States of the Union.

THE ISSUE OF LEGAL POLICY

It has, however, been suggested that by such a process "an important function of the United Nations may be frustrated." It is feared that an interpretation of the Charter permitting judicial development of the human rights provisions may persuade governments that the instruments by which they bind themselves will be made to serve unintended purposes; that governments will become reluctant to assume further commitments; and that the progressive development of international law will be retarded.⁴⁹ It may also be feared that judicial development of the human rights provisions will invade the sovereignty of states in unexpected ways, will arouse opposition and revolt in sections of the world where human rights are habitually ignored, perhaps leading to withdrawal of some states from the United Nations, and will lead to divergent interpretations of human rights by tribunals in different parts of the world.

(The issues here raised are ones of legal policy rather than of law. Apparently those who entertain these fears believe that international instruments ought to be restrictively construed, and that the realization of human rights ought to proceed by a process of education and international legislation rather than by a process of adjudication and the accumulation of judicial precedents.

✓ There have been two tendencies in the interpretation of the Charter. One is based on the assumption that the detailed provisions are designed to realize the purposes set forth in the Charter and should be construed liberally in a way to forward that design in the changing conditions of the world. This system tends to emphasize the authority of the organs of the

⁴⁸ *U. S. v. Worrall* (1798), 2 Dall. 384; *U. S. v. Hudson* (1812), 7 Cranch 32; *U. S. v. Coolidge* (1816), 1 Wheat. 415; *Q. Wright, Control of American Foreign Relations*, p. 197.

⁴⁹ Manley O. Hudson, "Integrity of International Instruments," this JOURNAL, Vol. 42 (1948), p. 108.

United Nations itself in interpreting and applying the Charter, to minimize the importance of evidence of the original intention of the parties as a guide to construction, and to tolerate continuous adaptation of procedures and organizations to accomplish the purposes of the Charter.

The other tendency is based on the assumption that the states in ratifying the Charter did not intend to limit their sovereignty and that therefore the detailed provisions should be construed restrictively. This system tends to emphasize the independence of the Members in interpreting and applying the Charter, to attach great weight to evidence of the original intention of the parties as a guide to construction, and to insist on the strict observance of prescribed procedures, even though such observance hampers or frustrates realization of the purposes of the Charter.

The difference in these two tendencies resembles that which divided Marshall and Taney, Webster and Calhoun, Lincoln and Davis in the construction of the United States Constitution.⁵⁰ It is possible that if the tendency supported by Marshall, Webster and Lincoln had had less weight in the early course of constitutional construction, there would have been no Civil War. It is also possible that if the tendency supported by Taney, Calhoun and Davis had had more influence there would have been no United States. Constitutions do not last unless they can grow beyond the intentions of their makers. They cannot adapt themselves to new conditions, if each of the vested interests which they seek to adjust has a veto on change. On the other hand, they become impotent unless their organs are in a measure stable and their procedures in a degree predictable.

(A proper system of Charter interpretation, therefore, seems to require a continual balancing of the intentions of the past with the needs of the present and future, of the interests of the parts with the purposes of the whole, of integrity of procedures with efficiency in the realization of objectives. It cannot be said that a meticulous construction on the assumption that states are reluctant to qualify their sovereignty is the only right construction. Nor can it be said that a liberal construction best adapted to achieving the purposes of the Charter and brushing aside awkward procedural arrangements is the only right construction.⁵¹ The first tend-

⁵⁰ "We must never forget that it is a Constitution we are expounding. . . . Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional." Marshall, C. J., in *McCulloch v. Md.* (1819), 4 Wheat. 316. "The Government of the United States is one of limited and delegated powers; it derives its existence and authority altogether from the Constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted." Taney, C. J., in *Ex parte Merryman* (1861), Taney's Reports, 246.

⁵¹ "A scientific interpretation has to avoid giving countenance to the fiction that there is always but a single 'correct' interpretation of the norms to be applied to concrete cases." H. Kelsen, *The Law of the United Nations* (London, 1950), pp. xiv-xvi.

ency, if pushed to an extreme, is likely to make realization of the purposes of the United Nations impossible, to eliminate the support of public opinion, and to doom the Organization to innocuousness and early demise. The second tendency, if pushed to an extreme, may create feelings of insecurity, open the way to a tyranny neglectful of established rights, and drive some Members to secession. Balance between the two seems to be the *desideratum*.

There is much experience which suggests that gradual development and adaptation of constitutions by the process of judicial application and administrative practice better preserve this balance than the process of formal amendment and explicit agreement. Governments are more interested in present purposes than in the intentions of their predecessors. It is doubtful whether any constitution can live unless it is continually made to serve some unintended purposes and to utilize some unanticipated methods. It does not seem likely that the United Nations will suffer if the wisdom of courts is given weight in the interpretation of the Charter along with the policies of governments.⁵²

On the specific matter of human rights it appears that the areas in which they are most regularly observed are those in which courts have had a large share in their interpretation and application. No one can question the need of education and international legislation in the field; but exclusive reliance on these processes is likely to mean that the most backward areas will set the rate of progress. To achieve widespread ratification of Covenants of Human Rights is a slow process at best, and even in the most advanced countries may be long frustrated by active minorities. National legislation to define human rights has been similarly frustrated, as illustrated in the long struggle of the Administration in Washington to achieve legislation for better enforcement of the most elementary human rights defined in the Constitution.⁵³

National courts may not always give a sound interpretation to treaty obligations in respect to human rights, but they are more likely to be guided by general principles than are local legislatures. On the whole the principle accepted in the United States, that courts apply international law and treaties, has led to a sounder general appreciation of international obligations and to their more regular application than has the principle, applied in varying degrees in other sections of the world, that it belongs

⁵² E. S. Corwin disagrees with critics of broad constitutional construction who regard new methods as "evasion" if they depart from their own conception of what the Constitution means, and who insist there is "something essentially dishonest about constitutional changes which are brought about by practice and usage." He contends "to the very contrary, that the most beneficial type of constitutional change is that which issues gradually from, and so has been thoroughly tested by, successful practice." *The Constitution and World Organization* (Princeton, 1944), p. 41.

⁵³ The Report of the President's Committee on Civil Rights, "To Secure These Rights" (Washington, 1947).

essentially to the legislature to give domestic effect to international obligations.⁵⁴ (There is no fundamental reason why the function of incorporating international law into municipal law should be regarded as a legislative rather than a judicial function.)⁵⁵ It has even been asserted that international law itself requires national courts to apply international law directly except insofar as national legislation may have made explicit rules on the subject.⁵⁶ In the United States there has been complaint of the increasing tendency in the Supreme Court, when faced by international problems, to look for guidance to the State Department or other political organs of the Government rather than to international law.⁵⁷ This tendency may be natural as a system of national law becomes more complete. In the early days of the American Republic, John Marshall and Joseph Storey had little international legislation or judicial precedent to go on, so they readily utilized the authority of Grotius and Vattel and the practice of nations to determine the rules which should be applied. Today sources of national law are available in far greater abundance and it is not surprising that courts refer to these sources rather than to sources of international law. It may also be true that legal education today pays less attention to international law than it did a century ago. Consequently, judges may be less familiar with international law than were their predecessors.⁵⁸ Added to these factors, however, it seems likely that the absolutistic conception of sovereignty, which developed during the nineteenth century, has influenced courts to feel less free to resort to international law.⁵⁹

⁵⁴ The differences in national practice in this regard are relative. All countries recognize that some treaty provisions and some rules of customary international law are "political" and outside the competence of courts. See Q. Wright, "The Legal Nature of Treaties," this JOURNAL, Vol. 10 (1916), p. 735; "International Law in its Relation to Constitutional Law," *ibid.*, Vol. 17 (1923), p. 236; Cyril M. Piccotto, *The Relation of International Law to the Law of England and the United States* (London, 1915), pp. 125-126; Ruth D. Masters, *International Law in National Courts* (New York, 1932); Philip Jessup, below, note 57.

⁵⁵ Q. Wright, *The Enforcement of International Law through Municipal Law in the United States* (Urbana, Ill., 1916), pp. 16 ff.

⁵⁶ Q. Wright, "International Law in its Relation to Constitutional Law," *loc. cit.*, p. 241; American Institute of International Law, *Declaration of the Rights of Nations*, 1916, this JOURNAL, Vol. 10 (1916), p. 124.

⁵⁷ Philip C. Jessup, discussing "Has the Supreme Court Abdicated One of its Functions?" (this JOURNAL, Vol. 40 (1946), p. 168), concludes: "There is more need today than there ever has been before for the coöperation of national courts in contributing to the development of international law." See colloquy participated in by George A. Finch, Manley O. Hudson, Willard Cowles, Eleanor Allen and others, *Proceedings, American Society of International Law*, 1948, pp. 73 ff.

⁵⁸ Paul Castleberry, *The Supreme Court and International Questions: 1917-1948* (Doctor's Dissertation, University of Chicago, 1949).

⁵⁹ J. B. Moore, *International Law and Some Current Illusions* (New York, 1924), p. 293.

PROPERTY-PROTECTION PROVISIONS IN UNITED STATES COMMERCIAL TREATIES

BY ROBERT R. WILSON

Of the Board of Editors

The matter of public international rules for the protection of private property rights has frequently received the attention of publicists, courts and treaty-makers. Some recent developments, bearing upon different aspects of the general subject, seem to attest its current and continuing importance. For example, the presentation to Congress of President Truman's Point Four plan occasioned questions as to the guaranteeing of overseas investments of United States citizens.¹ A few weeks later, at a meeting of the Economic and Social Council of the United Nations, a Belgian speaker and a representative of the International Chamber of Commerce emphasized the need for treating lenders according to certain standards of decency and fair play, and expressed the view that an economic climate encouraging to foreign investment was as far away as ever.² On a somewhat broader plane, the appearance in the Universal Declaration of Human Rights (1948),³ but not in the more recently evolved International Covenant on Human Rights (1950),⁴ of provisions looking to the right of individuals to own property ("alone as well as in association with others") and to be free from being arbitrarily deprived of it, raises questions as to whether the right of private property is not a basic "human" right.⁵

¹ Cong. Rec., Vol. 96, No. 102 (May 23, 1950), Senate, pp. 7603, 7604. See also note 106, *infra*.

² New York Times, July 11, 1950, p. 19.

³ U. S. Department of State Bulletin, Vol. XIX, No. 494 (Dec. 19, 1948), pp. 752-754; this JOURNAL, Supp., Vol. 43 (1949), p. 127. The relevant part of the Declaration is Art. XVII.

With this may be compared Art. VIII of the Draft Declaration of the Rights and Duties of Man, presented to the Ninth International Conference of American States by the Inter-American Juridical Committee, and Art. XXIII of the American Declaration of the Rights and Duties of Man, as approved by the Conference (Report cited in note 103, *infra*, pp. 118, 264), this JOURNAL, Supp., Vol. 43 (1949), p. 137.

⁴ Dept. of State Bulletin, Vol. XXII, No. 571 (June 12, 1950), pp. 949-954.

⁵ See statement by James Simsarian of the Department of State (*ibid.*, at p. 949): "The Commission decided not to include economic and social articles in the Covenant but, instead, to postpone the consideration of these articles until its 1950 session. It will consider at its 1950 session whether these articles should be contained in additional conventions on human rights or whether other measures should be proposed with respect to them. Consideration will particularly be given to the extent to which other organs and specialized agencies within the framework of the United Nations are already taking action with respect to these rights."

In the present study it is proposed to examine closely but one aspect of the general subject, namely, the manner in which protection of private property rights in general has been provided for in bilateral treaties of a particular type (general commercial treaties) to which the United States has been a party. The inquiry has been further restricted (1) to treaty provisions relating to the taking of property for public use, as distinct from those concerning aliens' rights to acquire, use and dispose of property, and (2) to the form and legal effect of such provisions in time of peace, the limitations of a brief study precluding a consideration of the effect of war upon private property rights. It seems useful, as a preliminary to an examination of the treaty provisions themselves, to note the amount of attention which the general subject of private property rights has received in some recent legal literature, and to consider, at least through illustrative decisions, case law on international aspects of the subject as declared by international tribunals.

I. VIEWS OF PUBLICISTS

Not merely international lawyers, but social scientists in general, have recently given considerable attention to the whole concept of property in its relation to society, political authority and law.⁶ As attention here is to

⁶ See, for example, Robert H. Lowie, "Incorporeal Property in Primitive Society," *Yale Law Journal*, Vol. 37 (1927-28), pp. 551-563; John Lurye, "The Evolution and Philosophy of Property," *Res Judicatae*, Vol. 3 (1946-47), pp. 181-186; A. Irving Hallowell, "The Nature and Function of Property as a Social Institution," *Journal of Legal and Political Sociology*, Vol. I (1943), Nos. 3-4, pp. 115-138; Herbert W. Schneider, "Pragmatism and Property," *ibid.*, pp. 5-9; Roscoe Pound, "The New Feudalism," *American Bar Association Journal*, Vol. 16 (1930), pp. 553-558; Francis S. Philbrick, "Changing Conceptions of Property in Law," *University of Pennsylvania Law Review*, Vol. 86 (1938), pp. 691-732; Robert E. MacIver, "Government and Property," *Journal of Legal and Political Sociology*, Vol. IV (1945-46), pp. 5-18; Mary Thomasine Cusack, *The Significance of a Changing Concept of Ownership in Social and Economic Planning* (1940); James H. Gilbert, "The Changing Concept of Property," *Papers of the Pacific Coast Economic Association*, 1942, pp. 5-14; Jacob Viner, "International Relations between State-Controlled Economies," *Amer. Economic Rev.*, Supp. (Papers and Proceedings), Vol. 34 (1944), pp. 315-329.

Property measures taken by the Nazi rulers of Germany are usefully discussed in Albert T. Lauterbach, *Economics in Uniform* (1943), especially at pp. 37, 79, 110, 148, 215. See also Paul Abel, "Foreign Confiscatory Legislation and Private International Law," *Modern Law Review*, Vol. 6 (1943), pp. 166-167; Martin Domke, "International Aspects of European Expropriation Measures," *New Jersey Law Journal*, Vol. 65 (1942), p. 37; Vinding Kruse, *The Right of Property* (tr. from the Danish by P. T. Federspiel, 1939), pp. 7-9; Frieda Wunderlich, "Germany's Defense Economy," *Quarterly Journal of Economics*, Vol. 52 (1938), pp. 401-430.

As examples of provisions in national constitutions on the subject of private property may be cited Art. 43 of the Constitution of Ireland (1937), and Arts. 38 and 39 of the Constitution of Argentina (1949); texts in Amos G. Peaslee (ed.), *Constitutions of Nations* (1950), Vol. I, p. 71, Vol. II, pp. 260-261.

be limited to the international legal aspects, it seems convenient to consider first the point of view of those who deny that there is, apart from treaties, a right of private property (in the sense of an alien owner's right to that which has been acquired in accordance with municipal law) under international law.

It has been suggested that to say that a state may expropriate property of foreign owners only with adequate compensation, is to follow a "scholastic" doctrine.⁷ One publicist, who is among the best known holders of the point of view, has stressed the importance of preserving universality, the difficulty or impossibility of securing from collectivist states assent to a doctrine of inviolability, and the risk of discrediting international law by entrenching individualism within it.⁸ He has questioned the justification for transforming a legal limitation of municipal law (affecting the power of the state in relation to those directly subject to its authority) into a duty of a state in relation to other states.⁹ An observer writing in 1939 suggested that "Fourteenth Amendment psychology" had doubtless been responsible in large measure for the American attitude on the question, and concluded that the assumption that international law upholds the sacred character of private wealth had had considerable validity in the past, but could no longer be considered as a rule of international law.¹⁰ It is obvious

On nationalization of property in the period since the close of hostilities in the second World War, see Seymour J. Rubin, "Nationalization and Private Foreign Investment: The Role of Government," *World Politics*, Vol. II (1950), pp. 482-510; Nicholas R. Doman, "Compensation for Nationalized Property in Post-War Europe," *International Law Quarterly*, Vol. III (1950), pp. 323-342.

⁷ E. A. Harriman, "The Right of Property in International Law," *Boston University Law Review*, Vol. 6 (1926), pp. 103-110, at pp. 104-105. The writer seemed to feel, however, that an "international right of property" might become a reality through the establishment and functioning of international organizations.

⁸ John Fischer Williams, "International Law and the Property of Aliens," *British Year Book of International Law*, Vol. IX (1928), pp. 1-30, at pp. 21-22.

⁹ *Ibid.*, p. 17.

¹⁰ Payson Wild, Jr., "International Law and Mexican Oil," *Quarterly Journal of Inter-American Relations*, Vol. I, No. 2 (1939), pp. 9, 10. What appears to be essentially the same conclusion is offered in Alf Ross, *Textbook of International Law* (1947), pp. 166-167.

Writing before the expropriations of the fourth decade of the twentieth century, Frederick S. Dunn in "International Law and Private Rights," *Columbia Law Review*, Vol. 28 (1928), pp. 166-180, observed (at p. 180): "From a functional point of view a possible solution would be to retain the rule of intervention but to except from its operation all governmental acts infringing upon vested property rights which were the result of *bona fide* social or economic reform, genuinely aimed to benefit the nation as a whole, and were not discriminatory against foreigners as such, nor liable to disturb to any substantial extent the existing methods of carrying on intercourse between nations." The writer pointed out that the instances in which, up to that time, responsibility had been successfully invoked in protection of vested property interests had been confined to cases of particular, rather than general, expropriations of property, and that these cases had not involved a wholesale social reform or a general redistribu-

that such views would not be inconsistent with belief in private property rights as matters of municipal law, and advocacy of them even on a wider geographical basis on grounds of morality, comity or utility. To deny that, apart from treaties, there is an international legal right of property, would not be to deny that the institution of private property was desirable. It would simply be to deny that, as a matter of international law, such a right exists.

Against this position is still arrayed, however, what is believed to be the weight of authority, which asserts that there is an international legal obligation, apart from treaties or other specific agreements, binding a state to respect the property rights that aliens have acquired within its territory in accordance with existing and applicable law.¹¹ This implies that there is, as one authority expresses it, an "instantly accruing obligation," when such property is taken by the state, to compensate or arrange to compensate.¹² Acceptance of this view would not seem necessarily to lead to the conclusion that a state, by its "attack upon the international agreement as to the sacredness of private property" and its failure to "agree with the common conscience of all other civilized nations upon its most fundamental question of morals and ethics," would be "excluded and excommunicated" from the society of civilized nations.¹³ If, however, it does not mean that international law requires any state to establish or maintain a system of private property,¹⁴ it does assert the obligation to respect the existing rights of foreigners in their legally acquired holdings. It does not concede that international law on this subject is non-existent because

tion of property at the expense of the existing propertied classes. On the distinction between large nationalization programs and isolated, non-programmatic expropriations, see Seymour J. Rubin, *loc. cit.*, pp. 484-485, 509-510. Cf. Oppenheim, *International Law* (7th ed.), Vol. I (1948), at p. 318, to the effect that, where fundamental changes in the political system and economic structure of a state, or far-reaching social reforms, entail interference on a large scale with private property, neither the principle of absolute respect for alien private property nor rigid equality with dispossessed nationals offers a satisfactory solution, and that, in such cases, it is probable that partial compensation will offer a solution consistent with legal principle.

¹¹ Charles Cheney Hyde, *International Law* (1945 ed.), Vol. I, pp. 710-722; Oppenheim, *op. cit.*, pp. 316, 627; A. V. Freeman, *International Responsibility of States for Denial of Justice* (1938), pp. 497-570; Alexander Fachiri, "Expropriation and International Law," *British Year Book of International Law*, Vol. VI (1925), pp. 159-171; "International Law and the Property of Aliens," *ibid.*, Vol. X (1929), pp. 32-56; Georges Kaeckenbeek, "*La Protection Internationale des Droits Acquis*," *Hague Academy of International Law, Recueil des Cours*, Vol. 59 (1937, I), pp. 321-415; material cited by E. M. Borchard in *Proceedings, American Society of International Law*, 1939, p. 62, note.

¹² Charles Cheney Hyde, *op. cit.*, Vol. I, p. 722.

¹³ As suggested by a speaker before the International Law Association, Report of the 34th Conference (1926), p. 259 (cited after John H. Herz, "Expropriation of Private Property," *Social Research*, Vol. VIII, No. 1 (1941), pp. 63-78).

¹⁴ Contrast Lorimer, *The Institutes of the Law of Nations* (1883-1884), Vol. I, p. 99.

of the supposition that "the status of private property is in a transition phase throughout the world, even in the politically most conservative states."¹⁵ Nor, as it has been advanced by the United States, does it concede that national treatment is the maximum which aliens whose property has been taken for public use may, in every case, demand. As is generally known, the proposition that no state can be legally held to accord to foreigners better treatment than that which its nationals receive, has not prevailed as a rule of customary international law.¹⁶ Opposed to it has been the idea of a minimum standard of justice, enforceable as international law, and which has come to be emphasized particularly in recent years. One writer, regarding the concept of equal treatment as an "outworn concept" in view of the fact that expropriating states sometimes offer their own nationals inadequate compensation, if any at all, observes that only since socialistic doctrines have been combined with the territorial concept of sovereignty has the principle of "international justice" or "minimum standard of justice" become important as a standard that can produce fair and equitable compensation.¹⁷

Given the existence of a rule of international law that there must be just and adequate compensation if alien-owned property is taken by the state for public use, there still remain difficulties in applying the general principle of law in particular situations. There will naturally be questions of what constitutes a "taking," of what comprises "arbitrariness" of taking,¹⁸ of how value is determined, and of procedural requirements in relation to the local law. A conclusion of publicists upholding the right to protection under international law would be less impressive if there were not a record of practice, and particularly of international case law, to support their conclusion.

II. DECISIONS BY INTERNATIONAL TRIBUNALS

Holdings of international tribunals furnish strong evidence of the fact that uncompensated expropriation of alien-owned property is contrary

¹⁵ Wild, *loc. cit.*, note 10, *supra*, at p. 9.

¹⁶ Andreas H. Roth, *The Minimum Standard of International Law Applied to Aliens* (1949), p. 122; Oppenheim, *op. cit.* (7th ed.), Vol. I (1948), pp. 316, 627; E. M. Borchard, "The 'Minimum Standard' of the Protection of Aliens," *Proceedings, American Society of International Law*, 1939, pp. 51-74; notes of July 21 and Aug. 22, 1938, from the Secretary of State to the Mexican Ambassador at Washington, concerning compensation for lands in Mexico expropriated by the Mexican Government (U. S. Department of State Publication No. 1288, *Inter-American Series No. 16*); Kaackenbeeck, *op cit.*, p. 412.

¹⁷ Nicholas R. Doman, "Postwar Nationalization of Foreign Property in Europe," *Columbia Law Review*, Vol. 48 (1948), pp. 1125-1161, at pp. 1135-1136.

¹⁸ *Ibid.*, p. 1130, referring particularly to the David Goldenberg case before the Mixed German-Rumanian Tribunal (Mix. Arb. Trib., *Recueil des Décisions*, Vol. VIII, pp. 694-697).

to existing international law. Nor is the payment of compensation in itself enough to satisfy the requirements of the law, since the "minimum standard" presupposes previous investigation of individual cases (as distinct from expropriations of a summary nature), the possibility of redress by legal action, and conformity with essentials of expropriation procedure.¹⁹

Among the nineteenth-century illustrations most commonly adduced in support of the proposition that the law protects aliens' property rights are the *Sicilian Sulphur Monopoly* case,²⁰ the diplomatic settlement arrived at between Greece and the United States in the case of Jonas King,²¹ and the *Delagoa Bay Railway Arbitration*.²² In the first of these there was a treaty on which the British relied in part, but this was not necessarily the sole ground on which the award was made, and the Sicilian Government did not succeed in its contention that foreigners were entitled to no better treatment than that which nationals received.²³ In the Jonas King matter the United States successfully pressed the argument that an American whose land in Athens was taken as a site for a church but later declared by the state to be needed for a road and parkway, was entitled to an indemnity, while the Greek Government failed in its contention that King, according to the law of nations and Article I of the treaty of Dec. 22, 1837, between Greece and the United States, was subject to Greek laws.²⁴ In the *Delagoa Bay Railway Arbitration* the applicant and the respondent state seemed from the *compromis* to agree that compensation was legally due for confiscation of tangible property (line and materials); the amount of compensation was left to be determined by the tribunal.²⁵

It does not substantially strengthen the case for international legal protection of aliens' property to speak of the latter in terms of "vested" rights,²⁶ although such descriptive language has often been used. Nor is it considered particularly helpful to define as vested those "private rights of foreigners which they enjoy in accordance with minimum standards of international law."²⁷ In whatever manner described, such rights seem to have been distinguished by the Permanent Court of International Justice in the case relating to German interests in Polish Upper Silesia, when it spoke of

¹⁹ Georg Schwarzenberger, *International Law*, Vol. I (1949), p. 102.

²⁰ 28 British and Foreign State Papers 1163.

²¹ J. B. Moore, *Digest*, Vol. VI, p. 263.

²² J. B. Moore, *International Arbitrations*, Vol. II, p. 1865.

²³ Cf. discussion in Alexander Fachiri, second article cited in note 11, *supra*, at p. 34.

²⁴ Sen. Doc. 9, 33rd Cong., 2nd Sess. (In the final settlement, Greece paid an indemnity of \$25,000.)

²⁵ Cf. Alexander Fachiri, second article cited in note 11, *supra*, at p. 37.

²⁶ Cf. the statement by Austin to the effect that to speak of "vested" rights is either to use a term that is superfluous or to beg the question. *Lectures on Jurisprudence* (1863), Vol. III, pp. 69, 70.

²⁷ Georg Schwarzenberger, *op. cit.*, Vol. I (1949), p. 85.

expropriation allowed under the terms of a convention as a "derogation" from the rules generally applied in regard to the treatment of foreigners.²⁸ In the later judgment relating to the indemnity in the *Chorzów Factory Case*, the Court distinguished between expropriation (the taking for fair compensation, *i.e.*, the value of the undertaking at the moment of dispossession plus interest to the day of payment), and the seizure (even with compensation) of property which, under a treaty rule, could not be taken at all, save under exceptional circumstances specified in the treaty.²⁹

The question of what constitutes a "taking" must be settled in the light of the circumstances of each case. Confiscatory breaches of concessions may be productive of, or accompanied by, the taking or transfer of property.³⁰ In some instances it has been held that arbitrary prohibition of exportation of property would in effect amount to confiscation.³¹ A mixed arbitral tribunal under the Treaty of Versailles found that the sequestrator of a forest had ordered the felling of trees which the condition of the forest did not require and that this effected a real disposal of property.³²

Tribunals necessarily have considerable discretion in computing losses suffered through expropriation. In the matter of Jonas King, already referred to, the Secretary of State suggested to the American Minister in Greece that loss suffered might be ascertained "by taking the opinion of intelligent and impartial foreigners, by recent sales of land in the vicinity,

²⁸ P. C. I. J., Series A, No. 7, p. 22.

²⁹ P. C. I. J., Series A, No. 17, pp. 46, 47.

A statement of the general principle, made by Arbitrator Huber in passing upon British claims against Spain, is reproduced in Jackson H. Ralston, *Supplement to the Law and Procedure of International Tribunals* (1936), pp. 51-52. See also the statement by Commissioner Bainbridge in the Rudloff claim (*Venezuelan Arbitrations*, Ralston's Report (1903), pp. 182, 189) to the effect that the taking away of rights that have been acquired, transmitted and defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property, and that such an act committed by a government against an alien gives, by established rules of international law, the right to such aliens' government to demand and receive just compensation. In the George W. Upton claim (Report of Robert C. Morris, United States-Venezuelan Claims Commission, Sen. Doc. 317, 58th Cong., 2nd Sess., pp. 384-389), the Commission conceded the right of a state, under stress of necessity, to appropriate private property for public use, but always with the corresponding obligation to make just compensation to the owner.

³⁰ Charles Cheney Hyde, *op. cit.*, Vol. I, p. 713. In the Oscar Chinn Case, however, the Permanent Court of International Justice held that respect due to vested rights of an alien does not imply an obligation for a state to refrain from granting such special rights to its own nationals as might result incidentally in losses to an alien (P. C. I. J., Series A/B, No. 63 (1934)). It would appear that protection against such losses to alien investors might be secured through national treatment provisions in treaties.

³¹ Claim of Costa Pendelion and George Andrew, in Fred K. Nielsen, *American-Turkish Claims Settlement* (1937), pp. 333, 336.

³² *Héritiers Gény v. État allemand; Alfred et Pierre Gény v. État allemand*, Mix. Arb. Trib., *Recueil des Décisions*, Vol. I, p. 394.

by a private arbitration of disinterested persons, or by any other sources of information," the purpose being, the Secretary indicated, to determine "not speculative and consequential losses, but such as would probably be adjudged by candid and practical men."³³ In the *Norwegian Ships Arbitration* the tribunal said that compensation was to be measured by the fair value of the property taken at the time and place of taking and in the light of all the surrounding circumstances; the fair market value must be paid, and this must be assessed *ex aequo et bono*.³⁴ In the *De Sabla Case*, the Panamanian-American Tribunal used as a basis for valuation an offer to buy at a time near that of the taking.³⁵ Replacement, as distinct from market, value has sometimes been found just.³⁶

Determination of the time at which the obligation to pay compensation arises might ordinarily be expected to present less difficult problems than would matters of valuation. Reasonably deferred payments will presumably not be unjustly burdensome to the claimant, if interest is awarded. In the case of the *Lord Nelson*,³⁷ the rule was applied that, if payment is not made when it is due (which would ordinarily be at the time of taking), interest should be paid at the rate that was current in the place at the time the principal became due. A leading authority speaks of the "fiscal equivalent of prompt payment . . . duly arranged at the outset."³⁸ Nor, according to what is believed to be the sound view, does the claimant necessarily have to bear the loss occasioned by long-drawn-out judicial proceedings in local courts. In the case of *Armendariz*, the Mexican-American Claims Commission under the convention of July 4, 1868, made an award against the United States and refused to agree with the argument of the American Agent that, since the case involved questions essentially judicial, no award should be made to the claimant while those questions were pending undetermined.³⁹

III. TREATY PROVISIONS BEFORE 1923

Space limitations of a brief study have permitted consideration of only a limited number of international judicial decisions relating to the re-

³³ J. B. Moore, Digest, Vol. VI, p. 263.

³⁴ Text in this JOURNAL, Vol. 17 (1923), p. 362. As is well known, the United States, while paying the award, protested that it was based upon the speculative, rather than the actual, value of what had been taken.

Another case in which a tribunal said that the value of property should be determined *ex aequo et bono* involved scientific documents that were contained in boxes which were attached and sold (*Barthélemy v. Etat allemand*, Mix. Arb. Trib., *Recueil des Décisions*, Vol. II, p. 31).

³⁵ Report of Bert L. Hunt, Agent for the United States (U. S. Dept. of State, Arbitration Series No. 6, 1934), p. 379.

³⁶ Case cited in note 32, *supra*.

³⁷ American and British Claims Arbitral Tribunal, Claim No. 20 (1914).

³⁸ Charles Cheney Hyde, *op. cit.*, Vol. I, p. 719.

³⁹ J. B. Moore, International Arbitrations, Vol. IV, p. 3722.

sponsibility of states growing out of expropriation of alien-owned property. There remains to be considered the rôle of bilateral commercial treaties in the protection of private property against uncompensated takings for public use. It is obvious that, in a particular case, an applicant state may appeal to both customary law and treaties.⁴⁰ It is also clear that parties to a treaty may provide for treatment more specific and more favorable to aliens than would a provision to apply international law. A respondent state, having agreed to such a treaty rule, would, for the purpose of cases falling within it, have waived its right to have its liability determined solely on the basis of customary international law.

It is convenient to consider, first, commercial treaties made before 1923 and then treaties made since that date. The line of division has been set in 1923 since, with the Treaty of Friendship, Commerce and Consular Rights which the United States signed with Germany on December 8 of that year,⁴¹ a new treaty pattern and some new language on the subject of property protection came into use.

At the outset it may be noted that a general commercial treaty (commonly called today a treaty of friendship, commerce and navigation)⁴² is, of course not the only type of international agreement in which are to be found provisions relating to protection of private property. Treaties of peace and agreements on various other subjects may contain them. Thus in the Jay Treaty, signed November 17, 1794, there was a provision whereby settlers and traders within prescribed precincts and jurisdictions were to continue to enjoy unmolested all their property of every kind, and were to be protected therein.⁴³ There were articles in the Oregon Treaty with Great Britain, signed June 15, 1846, relating to respect for property and providing for valuation of farms and other lands that might be taken for public use.⁴⁴ The Clayton-Bulwer Treaty, signed four years later, also provided for compensation for certain private property that might be taken.⁴⁵ In the Algeiras Convention, signed April 7, 1906, there were provisions whereby certain property might be expropriated with previous payment (in accordance with rules that were laid down) of a fair indemnity.⁴⁶ In the Conven-

⁴⁰ See note 23, *supra*.

⁴¹ 44 Stat. 2132; this JOURNAL, Supp., Vol. 20 (1926), p. 4.

⁴² On the scope of such treaties and their relation to economic foreign policy, see Robert R. Wilson, "Postwar Commercial Treaties of the United States," this JOURNAL Vol. 43 (1949), pp. 262-287.

⁴³ 18 Stat. (2) 269, Art. II. There were separate provisions on land (Art. IX) and on non-sequestration and non-confiscation of debts (Art. X). For an instance of the application of Art. II, see *Magnani v. Harnett* (1939), 14 N. Y. S. (2d) 107.

⁴⁴ 18 Stat. (2) 320, Arts. III, IV.

⁴⁵ 18 Stat. (2) 322, Art. III.

⁴⁶ 34 Stat. 2905. By Art. 114, "Expropriation can only be effected on the ground of public utility and when necessity for the same shall have been ascertained by any administrative investigation, the formalities of which shall be determined by Shereefian regulations drawn up with the assistance of the Diplomatic Body." In the case of foreign

tion for the Construction of a Ship Canal, signed November 18, 1903, the United States and Panama agreed that damage caused to owners of lands or other private property by reason of grants contained in the treaty or by reason of operations of the United States should be appraised and settled by a joint commission, the awards to be paid by the United States, but without the proceedings preventing, delaying or impeding work on the Canal.⁴⁷ Somewhat later, in the series of treaties by which the United States assented to the mandating of territories, it not only secured assurances of treatment as favorable as that which Members of the League of Nations should receive, but also specified, in phraseology varying somewhat from treaty to treaty, protection of American property rights in the mandated regions.⁴⁸

In the commercial treaties themselves, provisions on the protection of private property rights have commonly occurred in more than one context. It will be convenient to consider the provisions of the pre-1923 treaties as they are to be found in contexts relating to (1) access to courts, (2) embargoes and detentions, (3) general statements as to protection and security, and (4) specific references to expropriation and compensation.

In twenty-two instances there are mentions of protection in connection with access to courts, beginning with the treaty with Colombia, signed Oct. 3, 1824,⁴⁹ and ending with that with Peru, signed Aug. 31, 1887.⁵⁰ In fourteen of these there is a reference to "special protection" of private property. The remaining eight specify "full and perfect protection."

Over the period beginning with the signing of a treaty with The Netherlands on Oct. 8, 1782,⁵¹ and ending with the treaty with Ethiopia, signed Dec. 27, 1903,⁵² the United States in twenty-eight agreements included provisions against seizures or detentions, sometimes in relation to embargoes. The eighth article of the treaty with The Netherlands provided:

Merchants, masters and owners of ships, mariners, men of all kinds, ships and vessels, and all merchandizes and goods in general, and effects of one of the confederates, or of the subjects thereof, shall not be seized or detained in any of the countries, lands, islands, cities, places, ports, shores, or dominions whatsoever of the other confederate, for any military expedition, publick or private use of any one, by ar-

owners, where there was disagreement between the competent administration and the owner of the property to be expropriated, the indemnity was to be fixed by a special jury, or by arbitration, with the possibility of appeal from an arbitrator's decision (Arts. 116-119).

⁴⁷ 33 Stat. 2234, Art. VI. By the same article, the appraisals and assessments of damages were to be based upon the value of the property "before the date of this convention." On the application of this provision see Marjorie E. Whiteman, *Damages in International Law*, Vol. II (1937), pp. 1392-1402.

⁴⁸ See, for example, the statement in Art. III of the Treaty with France relating to Rights in the Cameroons, signed Feb. 13, 1923 (43 Stat. 1778-1789): "Vested American property rights in the mandated territory shall be respected and in no way impaired."

⁴⁹ 18 Stat. (2) 150, Art. 10.

⁵⁰ 25 Stat. 1444, Art. 15.

⁵¹ 18 Stat. (2) 533, Art. 8.

⁵² 33 Stat. (2) 2254, Art. 2.

rests, violence or any colour thereof; much less shall it be permitted to the subjects of either party to take or extort by force anything from the subjects of the other party, without the consent of the owner; which, however, is not to be understood of seizures, detentions and arrests which shall be made by the command and authority of justice, and by the ordinary methods, on account of debts or crimes, in respect whereof the proceedings must be by way of law, according to the forms of justice.

The several commercial treaties which the United States made between 1782 and the end of the eighteenth century contained somewhat comparable clauses, but with express references to embargoes, as well as detentions. Article 16 of the treaty with Prussia, signed July 11, 1799, contained a provision for "equitable indemnity" for ships or goods detained or used.⁵³ The 1824 treaty with Colombia specified a "sufficient" indemnification,⁵⁴ and seven later treaties, all with Latin American Republics, used this formula. The treaty with New Granada, signed December 12, 1846,⁵⁵ as also those with San Salvador, signed Jan. 2, 1850,⁵⁶ and May 27, 1870,⁵⁷ specified "equitable and sufficient indemnification." Four other treaties with Latin American Republics contained the rule of "full and sufficient indemnification," to be agreed upon and paid in advance. The commercial treaty with Italy, signed Feb. 26, 1871,⁵⁸ provided for "sufficient indemnification," to be agreed in advance "when possible," while that with Spain, signed July 3, 1902,⁵⁹ provided that "sufficient indemnification" should be agreed upon in advance "if practicable." The treaty with Mexico, signed April 5, 1831,⁶⁰ contained a still different formula, its Article VIII providing that:

The citizens of neither of the contracting parties shall be liable to any embargo; nor shall their vessels, cargoes, merchandise, or effects, be detained for any military expedition, nor for any public or private purpose whatsoever, without corresponding compensation.

The treaty with China, signed July 3, 1844,⁶¹ contained, in its Article XXVIII, the following:

Citizens of the United States, their vessels and property, shall not be subject to any embargo; nor shall they be seized or forcibly detained for any pretence of the public service; but they shall be suffered to prosecute their commerce in quiet, and without molestation or embarrassment.

Distinguishable from the types of provisions just examined are statements in broader, more general form. Such treaty statements did not begin with the first commercial treaty of the United States, that signed with

⁵³ 18 Stat. (2) 648, Art. 16.

⁵⁵ 18 Stat. (2) 550, Art. 8.

⁵⁷ 18 Stat. (3) 725, Art. 8.

⁵⁹ 33 Stat. 2105, Art. 5.

⁶¹ 18 Stat. (2) 116.

⁵⁴ Cited in note 49, *supra*, Art. 5.

⁵⁶ 10 Stat. 891, Art. 8.

⁵⁸ 17 Stat. 845, Art. 4.

⁶⁰ 18 Stat. (2) 476.

France on Feb. 6, 1778. The "treaty plan" of 1776, as approved by the Continental Congress on September 17 of that year,⁶² had in fact contained but little concerning protection of property on land, as compared with the proposals concerning property at sea. While instructed to press for the acceptance of a clause whereby American merchants residing in France would be exempt from the *droit d'aubaine*, the American negotiators at Paris were told to "let not the fate of the Treaty depend upon obtaining it."⁶³ Another part of the plan of 1776 contemplated that, in the event of war between the signatories, the merchants of one party in the other's territory would be allowed six months in which to depart. For property taken within that time "full satisfaction" should be made. However, a general property-protection clause, such as came to be a feature of later commercial treaties of the United States, did not appear in the first commercial treaty with France, although there was precedent for including one, as, for example, in the British-Spanish Treaty of Peace and Friendship signed May 23, 1667 (later incorporated into the Treaty of Utrecht, 1713).⁶⁴

United States treaties of the late eighteenth and the nineteenth centuries provided for the application of various standards in the treatment of property rights of treaty aliens. Most-favored-nation treatment was agreed to in the treaty with France, signed September 30, 1800,⁶⁵ in an article that applied to "property and persons" as well as to "what concerns trade, navigation, and commerce." Some later treaties were to employ this standard alone,⁶⁶ while, by the provisions of half a dozen agreements between 1845 and 1902, national treatment or most-favored-nation treatment was to be accorded.⁶⁷ Sometimes national treatment alone was specified,⁶⁸ while

⁶² Journals of the Continental Congress, Vol. V, pp. 768-779.

⁶³ *Ibid.*, p. 815.

⁶⁴ See Arts. XXIX, XXXI, XXXIII and XXXIV of the treaty of 1667, also the special sanction provided for in Art. XXXVI (British and Foreign State Papers, Vol. I, Pt. I, pp. 573, 574, 575 and 623). On the extent to which principles of the plan of 1776 were taken from the Treaty of Utrecht and from other treaties, see S. F. Bemis, *A Diplomatic History of the United States* (1936), pp. 25-26.

⁶⁵ 18 Stat. (2) 224, Art. XI.

⁶⁶ See, for example, Art. 2 of the Treaty of Commerce and Navigation with Liberia, signed Oct. 21, 1862, 12 Stat. 1245.

⁶⁷ Illustrated in Art. VI of the treaty with the Two Sicilies, signed Dec. 1, 1845, 9 Stat. 833. An interpretation of such a formula, which would require that the recipient of the treatment be given the benefit of whichever standard (national or most-favored-nation treatment) was more favorable to him, would seem to be reasonable.

⁶⁸ These treaties provided for "constant protection and security" and for national treatment. For example, Art. III of the treaty with Italy, signed Feb. 26, 1871 (17 Stat. 845) contained the following: "The citizens of each of the high contracting parties shall receive, in the States and territories of the other, the most constant protection and security for their persons and property, and shall receive in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives." A treaty amending

in other instances the provisions as to protection of property were not, in terms, on a contingent basis. Thus the Treaty of Amity, Commerce and Navigation with Mexico, signed April 5, 1831, set forth that the citizens of each state in the territory of the other should enjoy "in their houses, persons and properties the protection of the Government. . . ."⁶⁹ In its treaties signed with China in 1844 and 1858,⁷⁰ and in that signed with Korea in 1882,⁷¹ the United States secured provisions whereby its citizens were to be accorded special protection by local authorities, who were, if necessary, to despatch military forces to protect Americans' dwellings or property. It has been seen that another article of the 1844 treaty with China was designed to protect the property and vessels of American citizens from detention or seizure. The United States, however, has not taken the position that under no conditions could property of its citizens be taken for public use in the other country. As late as 1922 an instruction from the Department of State said that:

. . . Concerning the question of whether the Chinese authorities may exercise the right of eminent domain over property owned by American citizens in China, the Department may state that since the right is so essential to the existence of any sovereign state, the Department would not be inclined to question the exercise of the right by China in an appropriate case, that is, for a public purpose, but would of course be under the necessity of insisting that just compensation be made for any property taken or damaged and that there shall be no discrimination in this respect against American citizens.⁷²

Without being so specific as were those in the treaties with China, provisions have sometimes been broad without referring to either national or most-favored-nation treatment. Thus the treaty with Peru, signed August 31, 1887, after referring to permitted liberty of commerce and navigation,

this one, signed with Italy on Feb. 25, 1913 (38 Stat. 1669, 1670), provided, in Art. I, for "the most constant security and protection for their persons and property and for their rights. . . ." A treaty with Belgium, signed Nov. 10, 1845, had provided that "the same security and protection that is enjoyed by the citizens or subjects of each country shall be guaranteed on both sides" (18 Stat. (2) 48, Art. I). Similar wording is in Art. I of the treaty of March 18, 1875, with Belgium.

⁶⁹ 18 Stat. (2) 476, Art. 15. With this may be compared Art. 12 of the treaty with Honduras, signed July 4, 1864, which provides that citizens of each state "residing in any of the territories of the other party shall enjoy in their houses, persons, and properties the protection of the government, and shall continue in possession of the guarantees which they now enjoy" (13 Stat. 699); also Art. 12 of the treaty with Nicaragua, signed June 21, 1867 (18 Stat. (2) 566).

⁷⁰ The first of these is cited in note 61, *supra*. The second is in 12 Stat. 1023; see Art. XI.

⁷¹ 23 Stat. 720, Art. IV.

⁷² Hackworth, Digest, Vol. III, p. 654. On the point that the United States has not considered eminent domain as a practice that brought about confiscation, see Hearings before a Senate Sub-Committee, 80th Cong., 2nd Sess., Apr. 30, 1948, on the commercial treaty with Italy (signed Feb. 2, 1948), at p. 11.

residence and occupation of dwellings and warehouses, set forth that "everything pertaining thereto shall be respected. . . ." ⁷³ The 1894 treaty with Japan provided simply that citizens and subjects of each state in the territory of the other should "enjoy full and perfect protection for their persons and property." ⁷⁴

In exceptional cases there are references to constitutional provisions as affecting treatment. For example, the treaty with Switzerland, signed Nov. 25, 1850, ⁷⁵ and that with the Orange Free State, signed Dec. 22, 1871, ⁷⁶ provided for admission and treatment by each party of the citizens of the other (including, presumably, their treatment as to property rights) "on a footing of reciprocal equality," where such admission and treatment should not conflict with the constitutional or legal provisions of the contracting parties.

In a few of the commercial treaties which the United States made before 1923 there are, in contrast to the more general assurances noted above, specific references to "expropriation" or to compensation therefor, or to both. The first such provision was apparently that in the 1850 treaty with Switzerland, referred to above, which sets forth (in Article II, paragraph 3) that:

in cases of . . . expropriation for purposes of public utility, the citizens of one of the two countries, residing or established in the other, shall be placed upon an equal footing with the citizens of the country in which they reside with respect to indemnities for damages they may have sustained.

The treaty with the Orange Free State (also referred to above) follows the same formula, except that for "expropriation" are substituted the words "seizure or occupation," and for the words "purposes of public utility," the words "public purposes." Two nineteenth-century treaties with Latin American states ⁷⁷ contained clauses whereby property "of any kind" belonging to citizens of one party in the territory of the other, was not to be "taken for any public object without full and just compensation to be paid

⁷³ 25 Stat. 1444, Art. 2. In Art. 24 of the same treaty the parties, in a national treatment context relating to protection of persons and property, declare that "only in case that such protection should be denied, on account of the fact that the claims preferred have not been promptly attended to by the legal authorities, or that manifest injustice has been done by such authorities, and after all the legal means have been exhausted, then alone shall diplomatic intervention take place."

⁷⁴ 29 Stat. 848, Art. I. By Art. III of a convention signed with the United States on June 23, 1850 (18 Stat. (2) 79), the Sultan of Borneo engaged that citizens of the United States within his territories should, so far as lay within his power, enjoy "full and complete protection and security" for themselves and for any property which they might have acquired before the date of the convention or might acquire in the future.

⁷⁵ 11 Stat. 587, Art. 1.

⁷⁶ 18 Stat. (2) 580, Art. 1.

⁷⁷ 1867 treaty with Nicaragua, cited in note 69, *supra*, Art. IX, par. 3; 1870 treaty with Salvador, cited in note 57, *supra*, Art. XXIX, par. 4.

in advance." A treaty with the Congo State, signed Jan. 24, 1891, provided that property of the citizens and inhabitants of each party in the territory of the other party should "not be taken for public use without an ample and sufficient compensation."⁷⁸

From the foregoing it will appear that before 1923 detailed procedural provisions on what should be done in the event of a party's taking property for public use were not the rule. That the broad language in which the treaty provisions were phrased was intended to be applied according to a rule of reason would seem to be clear from the manner in which the clauses were applied, and sometimes from special wording in the instruments themselves. For example, an instruction of April 9, 1886, pointed out that "the thirteenth article of the treaty of 1846 with New Granada expressly provides for the special protection of citizens of the United States and their property against acts amounting . . . to *arbitrary* confiscations *by mere executive decree* of the property of citizens of the United States." The "special" protection provided for in the treaty, a further instruction stated, was "inconsistent with any *arbitrary* act of either Government whereby a citizen of the other may be deprived of his rights or injured in his property *without due process of law*."⁷⁹ In Article I of the treaty with Siam, signed Dec. 16, 1920, there is provision for "the most constant protection and security" for property, and specification of the national treatment standard. There is no specific reference in the text to the taking of property by due process or with the payment of just compensation; but notes exchanged at the time of signing stated that "Of course, all Mission lands are held subject to the exercise by the Siamese Government of the right of eminent domain."⁸⁰

IV. TREATY PROVISIONS SINCE 1923

If, as has been seen, the practice before 1923 was (except in the case of treaties with states that were not relatively advanced, and in some of which the United States had extraterritorial privileges) to incorporate broad statements of principle rather than detailed procedural prescriptions,⁸¹ there was to be no wide departure from this rule with respect to property

⁷⁸ 27 Stat. 926, Art. 3.

⁷⁹ U. S. Foreign Relations, 1886, pp. 170, 172 (*italics inserted*). See also Marjorie E. Whiteman, *op. cit.*, Vol. II, pp. 889-891.

⁸⁰ 42 Stat. 1928.

⁸¹ This does not overlook the fact of exceptional clauses appearing in particular treaties, as, for example, anti-monopoly clauses. See Art. 15 of the 1844 treaty with China (cited in note 61, *supra*); Art. 9 of the 1859 treaty with Paraguay (12 Stat. 1091); Art. 2 of the 1862 treaty with Turkey (12 Stat. 1213); and Art. 2 of the 1862 treaty with Liberia (12 Stat. 1245). See also Art. VII of the treaty of 1855 with the Two Sicilies (cited in note 67, *supra*).

Some treaties before 1923 had clauses on special types of property, as, for example, industrial property, or property in the form of commercial travelers' samples.

protection in treaties which the United States concluded between the first and second World Wars. Perhaps the greatest innovation was the inclusion in the treaty with Germany, signed Dec. 8, 1923, and in later treaties modeled on this one, ending with that signed with Liberia on August 8, 1938, of a specific mention of international law in indication of the degree of protection to be accorded. The formula follows:

The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.⁸²

The treaty with Siam, signed Nov. 13, 1937, has substantially similar language, except that in the comparable article there is added to the first sentence a statement that nationals of each party within the territories of the other "shall enjoy in this respect the same rights and privileges as are or may be granted to nationals of the State of residence," this being followed by a phrase similar to that in the other treaties concerning submis-

⁸² This language appears in treaties with the following states (the date of signature being shown in each case): Germany, Dec. 8, 1923 (cited in note 41, *supra*); Hungary, June 24, 1925 (44 Stat. 2441); Estonia, Dec. 23, 1925 (44 Stat. 2379); Salvador, Feb. 22, 1926 (46 Stat. 2817); Honduras, Dec. 7, 1927 (45 Stat. (2) 2618); Latvia, Apr. 20, 1928 (45 Stat. 2641); Norway, June 5, 1928 (47 Stat. 2135); Austria, June 19, 1928 (47 Stat. 1876); Poland, June 15, 1921 (48 Stat. (2) 1507); Finland, Feb. 13, 1934 (49 Stat. 2659); Liberia, Aug. 8, 1938 (54 Stat. 1739).

Concerning what had been done in the draft treaty for protection of a treaty alien, the Secretary of State said, in an instruction of Aug. 3, 1923, to the American Ambassador in Germany: "In the last paragraph of Article I unusual steps are taken to provide for the protection and security of his person and property in accordance with the requirements of international law. Moreover, his property is not to be taken without due process of law and without payment of just compensation." Dept. of State file 711.622/22A (National Archives).

In the negotiation of the treaty with Hungary, the Minister of that country said: "My Government feels confident that no controversy will ever arise as to the interpretation of the term 'just compensation' contained at the close of the fourth paragraph of Article I as far as the United States and Hungary are concerned. My Government is unable, however, to view with the same assurance questions that might arise with respect to the property of nationals of other countries which might avail themselves, by virtue of the most favored nation treatment clause of the provisions of the said paragraph. In order to forestall the possibility of this complication arising, it would be desirable to have the following interpretation embodied in the final protocol: 'Whenever the property of nationals of one High Contracting Party within the territories of the other shall be expropriated after due process of law, the just amount of compensation to be paid shall be determined in accordance with the principle of equal treatment with the nationals of the latter party' " (Dept of State file 711.642/10, National Archives). The proposed language was not, however, substituted for what the United States had proposed. On a protest in 1950 which invoked this treaty, see note 104, *infra*.

sion to conditions imposed upon nationals. Paragraph 4 of the Final Protocol accompanying the treaty recorded the parties' understanding "that the payment of just compensation provided for in Article I, paragraph 3, shall be determined by due process of law, without prejudice to redress, if any, according to international law."⁸³

The reference to "due process of law" in the German treaty and in later ones raises questions as to its meaning in relation to national constitutional arrangements.⁸⁴ In this connection, it has been subsequently emphasized that the "due process" mentioned in such a treaty as that with Germany is not the due process of the United States Constitution, but the due process required by international law, since the standard of "due process of law," whether procedural or substantive, of one of the parties is not controlling and does not necessarily reflect international law.⁸⁵

Another point of practical importance is the applicability of the treaty rules concerning property protection to artificial persons. With the treaty with Germany was begun the practice of including more specific reference

⁸³ 53 Stat. 1731. As in the case of the earlier treaty with Siam (note 80, *supra*), an exchange of notes recorded the parties' agreement that mission lands were held subject to the exercise of the right of eminent domain.

⁸⁴ A memorandum of the Solicitor of the Department of State concerning the paragraph of the German treaty, as quoted above, observed that: "This stipulation will operate to secure protection against arbitrary and unjust treatment in any particular in which the Government of a country does not accord its own nationals as liberal treatment as that which is recognized by international law" (Department of State file 711.622/60, National Archives).

A letter from the Solicitor to the Under Secretary and the Secretary of State, Dec. 5, 1923, noted as "what was perhaps the major German proposal" one that was amendatory of that provision of Art. I which contemplated that property should not be taken without due process of law and without the payment of just compensation. "The German Ambassador," the letter continued, "stated that the German Constitution permitted the taking of property without payment of just compensation and that the sentence quoted might be a violation of their fundamental law. While he intimated that it would be unlikely that the German legislature would avail itself of its constitutional right to take property of aliens without payment of just compensation, he stated there was a strong feeling in his country that the Constitution should not be interfered with. The reply in behalf of the Department was that the sentence in the American text did not contemplate a yielding of anything which the German Constitution forbade, and it was, therefore, in no sense a violation of that document; and that it merely marked an agreement by Germany *not to exercise a constitutional right*, and one which if exercised would cause immediate protest by this Government in so far as it applied to American citizens." U. S. Foreign Relations, 1923, Vol. II, p. 28 (*italics inserted*).

On the meaning of "process of law" as used in a treaty (not a commercial treaty), see Ops. Atty. Gen., Vol. V, pp. 333, 338, and Vol. VI, p. 533.

⁸⁵ Hearings before the Committee on Patents, House of Representatives, 77th Cong., 1st Sess., on H. J. Res. 32, 73, and 123, at pp. 59, 64, 69. Cf. the opinion of Georg Schwarzenberger, *op. cit.*, pp. 99, 238, on the minimum standards of international law in relation to the "minimum requirements of the rule of law in the Anglo-American sense of the term."

to companies ("limited liability and other corporations and associations") in connection with some treaty rights and privileges. Without prejudice to the interpretation of earlier treaties (those which made no *specific* reference to artificial persons) in such a way as to confer upon companies rights and privileges which were conferred in terms upon "nationals," "citizens," or "residents," it would appear that so basic a right as the protection of private property against uncompensated expropriation would be understood to exist by reason of customary international law, whether or not it was also spelled out in the terms of particular treaties.⁸⁶ On this point, later agreements were, however, to be more specifically inclusive.

Soon after the cessation of hostilities in the second World War the United States began to make new commercial treaties. The first of these, signed with China on Nov. 4, 1946,⁸⁷ referred, as had the treaties of the inter-war period, to "the most constant protection and security" to be accorded nationals of one party in territory of the other; but, for the words "that degree of protection that is required by international law," were substituted the words "the full protection and security required by international law." In the same paragraph it was stated that "in so far as the term 'national' where used in this paragraph is applicable in relation to property it shall be construed to include corporations and associations." The following paragraph contains the rule that:

The property of nationals, corporations and associations of either High Contracting Party shall not be taken within the territories of the other High Contracting Party without due process of law and without the prompt payment of just and effective compensation.

There follow in the same paragraph provisions relating to exchange withdrawal privileges for the recipient of such compensation. A separate paragraph commits the parties to accord national and most-favored-nation treatment with respect to the matters covered in the preceding paragraphs of the article.⁸⁸ By a provision in the general exceptions

⁸⁶ In the course of the hearings referred to in note 85, a witness expressed the opinion that Art. 12 of the treaty with Germany (concerning recognition of the juridical personality of limited liability and other corporations and associations) extended the protective provisions of Art. I to limited liability companies, corporations and associations (*loc. cit.*, p. 64).

⁸⁷ U. S. Treaties and Other International Acts Series, No. 1871, this JOURNAL, Supp., Vol. 43 (1949), p. 27.

⁸⁸ The part of Art. VI relating to exchange withdrawal is as follows: "The recipient of such compensation shall, in conformity with such applicable laws and regulations as are not inconsistent with paragraph 3 of Article XIX of this Treaty, be permitted without interference to withdraw the compensation by obtaining foreign exchange, in the currency of the High Contracting Party of which such recipient is a national, corporation or association, upon the most favorable terms applicable to such currency at the time application therefor is filed, provided application is made within one year after receipt of the compensation to which it relates. The High Contracting Party

article (XXVI, par. 5), the parties reserve the right to deny rights and privileges to companies which, while created or organized under the laws and regulations of the other party, are owned or controlled by nationals or companies of any third country or countries.⁸⁹ The commercial treaties which the United States has signed since 1946 (that with Italy, Feb. 2, 1948,⁹⁰ that with Uruguay, Nov. 23, 1949,⁹¹ and that with Ireland, Jan. 21, 1950),⁹² reveal some variations from the treaty with China. The Italian treaty follows fairly closely the language referred to above, except that there is some difference in the exchange withdrawal provisions;⁹³ and a provision in the protocol makes clear that "property" is to apply to interests held directly or indirectly.⁹⁴ There is a rule to apply to the taking of private enterprises into public ownership and under public control,⁹⁵ and another in regard to treatment of certain types of foreign-owned enterprises that are in competition with local publicly owned or controlled enterprises.⁹⁶

The treaty with Uruguay—called a Treaty of Friendship, Commerce and Economic Development rather than a treaty of friendship, commerce and navigation—does not refer in terms to international law in connection with protection of property. Article II, paragraph 1, is as follows:

The nationals of either High Contracting Party within the territories of the other Party shall receive the most constant protection and security, and shall be accorded, in like circumstances and conditions, treatment, protection and security no less favorable than are accorded

allowing such withdrawal reserves the right, if it deems necessary, to allow such withdrawal in reasonable instalments over a period not to exceed three years." Art. XIX, par. 3, referred to in the foregoing quotation, states principles as to exchange control and includes, *inter alia*, national and most-favored-nation treatment provisions.

⁸⁹ See note 98, *infra*.

⁹⁰ U. S. Treaties and Other International Acts Series, No. 1965.

⁹¹ Sen. Ex. D, 81st Cong., 2nd Sess.

⁹² Sen. Ex. H, 81st Cong., 2nd Sess.

⁹³ These refer to the most favorable terms applicable "at the time of taking of the property" rather than at the time application is filed. The same sentence contains the words "exempt from any transfer or remittance tax." There is no specific provision for instalment withdrawals. It is, of course, to be noted that these and other provisions of the treaties are to be read in the light of the general exceptions provisions, *e.g.*, on foreign exchange. Art. XXVI, par. i (c) of the treaty with China, and, in the case of the Italian treaty, Art. XXIV, par. I (f), and especially par. 6 of the Additional Protocol. The latter reads as follows: "Whenever a multiple exchange rate system is in effect in Italy, the rate of exchange which shall be applicable for the purposes of Article V, paragraph 2, need not be the most favorable of all rates applicable to international financial transactions of whatever nature; provided, however, that the rate applicable will in any event permit the recipient of compensation actually to realize the full economic value thereof in United States dollars. In case dispute arises as to the rate applicable, the rate shall be determined by agreement between the High Contracting Parties."

⁹⁴ Protocol, par. 1, with its cross-reference to Art. V, par. 2.

⁹⁵ See Art. V, par. 3, final sentence.

⁹⁶ Protocol, par. 2.

to the nationals of such other Party for the protection of their persons, rights, and property. This rule shall be applicable also to institutions, juridical persons, and associations.

An assurance of protection and security for property is in the second paragraph of Article VIII of the same treaty, which is as follows:

Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party. The taking of property legally acquired by the nationals and companies of either Party within the territories of the other Party shall be subject to procedures and conditions no less favorable than those legally applicable in the case of the taking of the property of nationals of such other Party. Any expropriation shall be made in accordance with the applicable laws, which shall at least assure the payment of just compensation in a prompt, adequate and effective manner.⁹⁷

A new article (IV) in the Uruguayan treaty, not found in earlier treaties that have been referred to, provides as follows:

Each High Contracting Party shall at all times accord equitable treatment to the capital of nationals and companies of the other Party. Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests of such nationals and companies in the enterprises which they have established or in the capital, skills, arts or technology which they have supplied. Neither Party shall without appropriate reason deny opportunities and facilities for the investment of capital by nationals and companies of the other Party; nor shall either Party unreasonably impede nationals and companies of the other Party from obtaining on equitable terms, the capital, skills, modern techniques and equipment it needs for its economic development.

As in the Italian treaty, there is a national-treatment provision on the taking of private enterprises into public ownership or under public control (Art. VIII, par. 3), and there are provisions (Protocol, par. 1) which are substantially similar to the corresponding provisions in the Italian treaty on treatment of certain types of foreign-owned enterprises that are in competition with local publicly controlled enterprises.

⁹⁷ There is not in this paragraph a provision concerning exchange withdrawal privileges in the event of expropriation. This is covered, however, in Article XV of the treaty that relates to exchange control. Its paragraph 4 mentions, as one of the types of transfer to which the rule of the paragraph applies, "transfers of compensation for property referred to in paragraph 2 of Article VIII." It should be noted that the same article, and comparable provisions in the treaties with Italy and Ireland, allow tolerances, in the matter of exchange withdrawals, in periods of financial stringency.

In the Minutes of Interpretation which were printed with the treaty as approved by the United States Senate (Cong. Rec., Senate, July 6, 1950, p. 9861) it is stated that the second sentence of Art. VIII, par. 2 is "not intended to require indemnification in cases such as confiscation of contraband and distraint for nonpayment of taxes or debt."

The treaty with Ireland contains two separate articles in which appear provisions looking to "most constant protection and security," but the first of these (Art. II, par. 1) does not in specific terms refer to property. The second paragraph of Article VIII is as follows:

Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party, in no case less than that required by international law. Such property shall not be taken without the prompt payment of just and effective compensation. Nationals and companies of either Party shall be permitted to withdraw from the territories of the other Party the whole or any portion of such compensation, and to this end shall be permitted to obtain exchange in the currency of their own country freely at a rate of exchange that is just and reasonable.

The treaty with Ireland also contains (Protocol, par. 5) a provision similar to that contained in the Italian treaty, extending protection to property interests held directly or indirectly. There is in Article VIII, par. 2, a national-treatment rule in regard to taking property into public ownership or under public control, and provisions (Art. XV, par. 2) in regard to rights and privileges of certain types of private corporations in competition with local ones publicly owned and controlled. The fifth article of the Irish treaty contains wording comparable, although not identical, with the article quoted above from the Uruguayan one, on "equitable" treatment by each party of the capital of the nationals and companies of the other party.⁹⁸

It will be seen from the above (1) that each of the general commercial treaties which the United States has signed since 1923 specifies "the most constant protection" for property of one party's nationals in the other's territory; (2) that in the treaties signed since the cessation of hostilities in the second World War companies have been specifically mentioned as within this protection, without leaving this to be implied; (3) that with but one exception there is a reference to what international law requires (although that standard would seem to be, at least in the more recent treaties in which it is specified, expressive of the *minimum* treatment intended); (4) that fifteen of the treaties provide, *inter alia*, that property shall not be taken "without due process of law," while the treaty with Uruguay refers, in a national treatment context, to "procedures and conditions" in connection with taking, and that with Ireland makes no specific reference to "process" or "procedures" but makes clear that in

⁹⁸ The reservation (as in the treaties with China and Italy) of each party's right to deny treaty advantages to companies in the ownership or direction of which nationals of a third country or countries have a controlling interest is repeated in the treaties with Uruguay and Ireland, but with an exception in respect to recognition of juridical status and access to courts. See Art. XVIII, par. 1 (e) of the treaty with Uruguay and Art. XX, par. 1 (f) of that with Ireland.

no case shall less than national and most-favored-nation treatment be accorded; (5) that whereas the treaties of the inter-war period specified that, in the event of expropriation, there must be "just" compensation, three of the treaties signed since the cessation of hostilities in the second World War provide for "just and effective" compensation, while the treaty with Uruguay refers to applicable laws "which shall at least assure the payment of just compensation in a prompt, adequate and effective manner"; (6) that three of the four most recent treaties provide for "prompt" payment, while, as has just been noted, the treaty with Uruguay uses the adjective with reference to the *manner* in which payment must be provided for by local law; (7) that in three of the most recently signed instruments there are some provisions concerning exchange withdrawal in connection with expropriations; (8) that in the three most recently signed there are commitments for national treatment by each party of the other party's nationals and companies in all matters connected with the taking of privately owned enterprises into public ownership and under public control; (9) that in each of the same three treaties the parties agree that certain types of privately owned and controlled enterprises shall, with important exceptions, receive advantages accorded to local publicly owned and controlled enterprises which are in competition with them; (10) that in each of the two most recently signed treaties there is, in addition to other clauses relating to protection, a commitment to accord "equitable" treatment to capital.⁸⁹

In the matter of adjective law between states there is one point of sharp contrast between the new pattern of commercial treaty and earlier models, in that each of the four instruments signed since 1945 contains a compromissory clause looking to reference of disputes as to interpretation and application to the International Court of Justice. Questions of what treatment is "just," or what compensation is adequate or effective, need not be left, in the final analysis, to decision by each interested party for itself.

V. CONCLUSIONS

Perhaps the most general observation justified by the survey which has been undertaken is that, whereas commercial treaties have traditionally included provisions on protection of property, recent treaties have shown a tendency toward greater precision, and have reflected a realistic view of new economic developments. Various standards of treatment are in use. If, as in the case of nearly all the treaties since 1923, there is a reference to international law as a standard, the wording does not neces-

⁸⁹ On the general utility of "equitable" treatment as a standard, in comparison with others, see Georg Schwarzenberger, "The Province and Standards of International Economic Law," *International Law Quarterly*, Vol. II (1948), pp. 402, 411.

sarily do more than make this the "floor" in any case. As such, its reach extends to both adjective and substantive law. The alien property-owner's *right* may be distinguished from his remedy. Parties agreeing to what international law requires retain, of course, the rights which they have under the rule as to exhaustion of local remedies. It is not believed, however, that the prevailing concept of denial of justice has become so limitative as to make references to the international law standard ineffectual, or that the idea that international remedies may be excluded through Calvo Clauses has received sufficient assent to have such an effect.¹⁰⁰ Even without express reference to the law, it would still be true, as is in fact stated in words in the most recent of these treaties, that "treaty commitments are to be construed in the light of international law."¹⁰¹ There is an impressive body of case law which makes meaningful specific references to the standard, but the lack of universal agreement on what the standard now requires may make it appropriate to supplement practice with more precise rules.

The meaning of such words as "just," "adequate," "prompt," and "effective" can be ascertained from the intention of the parties, in the light of customary law and practice, and common sense.¹⁰² Questions of whether particular companies are public, or private, or mixed, may arise in connection with application of provisions touching selections for nationalization, or competition between foreign-owned private concerns and local public ones. The manner in which exchange withdrawal provisions of the newer treaties have been related to the obligations of parties under the Articles of Agreement of the International Monetary Fund and also the extent to which the treaties allow for elasticity in periods of financial stringency, seem likely to have a bearing upon their utility. Provisions which entrust to the International Court of Justice the office of final, authoritative interpreter should provide safeguards against any party state's arbitrary or unreasonable constructions.

Aside from strict legalism, questions of policy arise, and in their basic objectives the bilateral commercial treaties should be considered in relation to promotion of commercial and cultural exchange, to the provision of foreign economic assistance, and to the purposes of the United Nations.

¹⁰⁰ For an exceptional case of a treaty reference to "manifest injustice" and exhaustion of local remedies, see note 73, *supra*.

For what is believed to be a sound view as to limitations upon the capacity of private concerns to contract away international legal remedies, see K. Lipstein, "The Place of the Calvo Clause in International Law," *British Year Book of International Law*, Vol. XXII (1945), pp. 130-145.

¹⁰¹ Treaty with Ireland, Protocol, par. 12.

¹⁰² See the Treaty of Commerce and Navigation between the United States and the Ottoman Empire, signed Feb. 25, 1862, concerning plain and fair construction of the terms. 12 Stat. 1213, Art. XXI.

That the United States has not been willing to accept national treatment as the maximum which its private investors can rightfully expect is indicated by its position at the International Conference of American States at Bogotá in 1948, when, on a close vote, it successfully opposed the Mexican Delegation's proposal to the effect that there would be prompt, adequate and effective compensation for expropriation "except when the constitution of any country provided otherwise."¹⁰³ That the American Government is not disposed to condone uncompensated expropriation, or discriminatory treatment of its citizens as compared with other foreigners, is illustrated by a recent protest to Hungary over that country's actions under its nationalization law of December 28, 1949.¹⁰⁴ In the carrying out of its total economic foreign policy, especially that of promoting peace and raising standards of living by relieving and assisting economically underdeveloped areas, the United States has apparently assigned great relative importance to private capital and skills. The policy would seem to presuppose that democratic capitalism has the capacity to assist toward improvement of the world situation, and that private individuals and companies having part in this process, while accepting substantial obligations

¹⁰³ Report of Ninth International Conference of American States (U. S. Department of State Publication 3263, American Republics Series No. 3), pp. 66, 67. The provision referred to was proposed for insertion in Art. 25 of the Economic Agreement. Art. 23 of that Agreement provides, *inter alia*, that foreign investments should be made with due regard not only for the legitimate profit of the investors, but also with a view to accelerating the sound economic development of the country in which they are made, and that, with respect to employment and the conditions thereof, just and equitable treatment should be accorded to all personnel, both national and foreign. By Art. 25 "Any expropriation shall be accompanied by payment of fair compensation in a prompt, adequate and effective manner." On substantially the point involved in the Mexican proposal referred to above, the delegations of eight Latin American states made reservations to this article (document cited, pp. 214-216). See Martin Domke, "Some Aspects of the Protection of American Property Interests Abroad," Record of the Association of the Bar of the City of New York, Vol. 4, No. 7 (1949), p. 268.

¹⁰⁴ U. S. Dept. of State Bulletin, Vol. XXII, No. 558 (March 13, 1950), p. 399. The note, referring to the Treaty of Friendship, Commerce and Consular Rights signed in 1926 (cited in note 82, *supra*), said that the United States would hold the Government of Hungary "wholly responsible for the payment of adequate and effective compensation for the property rights of American nationals affected by the present edict as well as by previous laws and decrees," and drew attention to the fact that interests of the Soviet Union had been exempted from nationalization under provisions of the edict, this discrimination being in clear violation of the treaty.

On the 1948 agreement with Yugoslavia, by which the United States obtained funds with which to pay the claims of Americans who had suffered by reason of nationalization measures, see Seymour J. Rubin, *loc. cit.* (note 6, *supra*), pp. 489-490. The International Claims Commission, created by Public Law 455, 81st Cong., 2nd Sess., is authorized to apply, in the decision of such claims, provisions of the applicable claims agreement and "the applicable principles of international law, justice and equity."

as toward the countries in which they invest, are properly due reasonable protection.¹⁰⁵ Commercial treaties provide one means to that end.¹⁰⁶

¹⁰⁵ The Act for International Development, approved June 5, 1950, sets forth the finding of Congress that "Technical assistance and capital investment can make maximum contribution to economic development only where there is understanding of the mutual advantages of such assistance and investment and where there is confidence of fair and reasonable treatment and due respect for the legitimate interests of the peoples of the countries to which the assistance is given and in which the investment is made and of the countries from which the assistance and investments are derived. In the case of investment this involves confidence on the part of the people of the underdeveloped areas that investors will conserve as well as develop local resources, will bear a fair share of local taxes and observe local laws, and will provide adequate wages and working conditions for local labor. It involves confidence on the part of investors, through intergovernmental agreements or otherwise, that they will not be deprived of their property without prompt, adequate, and effective compensation; that they will be given reasonable opportunity to remit their earnings and withdraw their capital; . . . that they will enjoy security in the protection of their persons and property. . . ." Public Law 535, 81st Cong., 2nd Sess., Title IV.

¹⁰⁶ See the statement of the Secretary of State concerning the negotiation of such treaties, in Hearings before the Committee on Foreign Relations, U. S. Senate, 81st Cong., 2nd Sess., on the Act for International Development (March 30 and April 3, 1950) at pp. 6-7. On the relationship of the treaties to a plan for guaranties of private investments in the foreign field, see the statement of Norman M. Littell, *ibid.*, pp. 75, 76. Reporting on H. R. 8083, the House Committee on Banking and Currency, referring to treaty assurances in relation to the statutory plan for guaranties of investments said that: "Treaties alone . . . cannot give an investor the assurances which he may legitimately require in order to risk his capital abroad." It emphasized that in some circumstances, despite the good faith of foreign governments involved, expropriation might become unavoidable, there might be inability to pay promptly, and a guaranty plan might be needed to cover uncompensated expropriations or currency inconvertibility. House Report 1960, 81st Cong., 2nd Sess., pp. 2, 3-4.

NOTES ON LEGAL QUESTIONS CONCERNING THE UNITED NATIONS

BY YUEN-LI LIANG *

COLONIAL CLAUSES AND FEDERAL CLAUSES IN UNITED NATIONS MULTILATERAL INSTRUMENTS

I. UNITED NATIONS PRACTICE WITH RESPECT TO THE COLONIAL CLAUSE

The question of including in an international multilateral instrument provisions defining the application of the instrument to the dependent territories of the contracting states has been a controversial subject in the United Nations. Such provisions, generally known as "colonial clauses," may take one of three forms. They may provide for the optional application of an instrument to the dependent territories of the contracting states, so that the instrument does not apply to the dependent territories of any contracting state unless the latter chooses to extend the application of the instrument to all or any of its dependent territories. On the other hand, they may provide for the optional exclusion from the application of the instrument of the dependent territories of the contracting states, so that the instrument applies to the dependent territories unless a contracting state chooses to exclude from the application of the instrument all or any of its dependent territories. A third type of colonial clauses may provide for the automatic application of the instrument to the dependent territories of all contracting states. However, there are instruments, notably the Convention on the Privileges and Immunities of the United Nations, which do not contain any reference at all with respect to their application to dependent territories. In such cases, the general rule¹ seems to be that, subject to express or implied provisions to the contrary, the instruments apply to all the territories of the contracting states, including their dependent territories. The following is an account of the developments in connection with several multilateral instruments considered by the General Assembly of the United Nations or concluded under the auspices of the United Nations.

* Associé of the Institute of International Law. Acknowledgment is made to Mr. H. T. Liu, Legal Counselor in the Legal Department of the Secretariat of the United Nations, for assistance in the preparation of the notes.

¹ See McNair, *The Law of Treaties*, p. 77. Cf. Fawcett, "Treaty Relations of British Overseas Territories," *British Year Book of International Law*, Vol. 26 (1949), pp. 86-107.

1. *Draft Protocols to Amend Conventions relating to Traffic in Women and Children and to Traffic in Obscene Publications*

In the General Assembly of the United Nations, controversy over the inclusion of the colonial clause first arose at the second session in 1947 in connection with the question of the "transfer to the United Nations of the functions and powers exercised by the League of Nations under the international Convention of 30 September 1921 on Traffic in Women and Children, the Convention of 11 October 1933 on Traffic in Women of Full Age and the Convention of 12 September 1923 on Traffic in Obscene Publications."² Each of the three conventions contains a colonial clause. Although the forms vary, they all permit a contracting party to declare that its signature did not include all or any of its dependent territories and allow it to adhere subsequently and separately to the convention on behalf of all or any of such territories.³

In order to carry out the transfer to the United Nations of the functions and powers of the League of Nations under the conventions, the Economic and Social Council prepared and recommended to the General Assembly for adoption two draft protocols, one to amend the two Conventions relating to Traffic in Women and Children and another to amend the Convention on Traffic in Obscene Publications.⁴ The Council, however, made no suggestion for modifying the substance of the colonial clauses of the conventions.

When the draft protocols were considered by the General Assembly at its second session in 1947, the Third Committee adopted an amendment submitted by the Delegation of the Soviet Union which was calculated to

² Previously, the General Assembly had, during the second part of its first session in 1946, approved the "Protocol amending the Agreements, Conventions and Protocols on Narcotic Drugs concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936." One of the conventions referred to in the protocol, namely, the Convention for the Suppression of Illicit Traffic in Dangerous Drugs, signed at Geneva, June 26, 1936, contained a colonial clause in Art. 18. This provided that any party may declare that "he does not assume any obligation in respect of all or any of his colonies, protectorates, overseas territories or territories under suzerainty or mandate," and that any such party may subsequently extend the application of the convention to all or any such territories. No discussion, however, took place on this clause which was left intact.

³ The text of the Convention for the Suppression of the Traffic in Women and Children is found in 9 League of Nations Treaty Series (Art. 14), at p. 427. The text of the Convention for the Suppression of the Traffic in Women of Full Age is found in 150 *ibid.* (Art. 10), at p. 441. The text of the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications may be found in 27 *ibid.* (Art. 13), at p. 229.

⁴ Resolution of the Economic and Social Council No. 81(V), adopted on Aug. 14, 1947. U.N. Doc. E/573, pp. 45-53; also Docs. A/372, A/372/Add.1.

delete from all three conventions the colonial clauses mentioned above.⁵ In the plenary meeting an attempt was made by the Delegation of the United Kingdom to reverse the decision of the Third Committee. It was unsuccessful and the colonial clauses in the conventions in question remained eliminated.⁶

2. *Protocol Amending the International Convention relating to Economic Statistics*

The International Convention relating to Economic Statistics, signed at Geneva on December 14, 1928, contains a colonial clause, namely, Article 11. This article provides, in substance, that any contracting party may declare that it does not assume any obligations in respect of all or any of its colonies, protectorates, overseas territories or territories under suzerainty or mandate, and that any such party may subsequently extend the application of the convention to all or any such territories. It also provides for the denunciation of the convention in respect of all or any such territories.⁷

With a view to effecting a transfer to the United Nations of the functions and powers exercised by the League of Nations under the convention, the Statistical Commission of the Economic and Social Council prepared a draft protocol for amending the convention.⁸ This draft protocol and a set of amendments to the convention were submitted to the Economic and Social Council, which approved and recommended them to the General Assembly.⁹ The proposed amendments to the colonial clause were largely confined to substituting the United Nations for the League of Nations, and trust territories for territories under mandate. The content of the clause was retained.

At the first part of the third session of the General Assembly in 1948, a proposal was made in the Sixth Committee by the representative of Haiti for the deletion of the colonial clause.¹⁰ The representatives of Yugoslavia,

⁵ The Soviet amendment is contained in U.N. Doc. A/C.3/165, par. 3, reproduced in General Assembly, 2nd Sess., Official Records, 3rd Committee, p. 238. For proceedings, see *ibid.*, pp. 92, 93. The report of the 3rd Committee is U.N. Doc. A/412, General Assembly, 2nd Sess., Official Records, Plenary Meetings, Vol. II, pp. 1507-1509.

⁶ See Records of the 96th and 97th plenary meetings, General Assembly, 2nd Sess., Official Records, Plenary Meetings, pp. 340-355.

⁷ For text of convention, see 110 League of Nations Treaty Series (colonial application clause, Art. 11), at p. 189. Also reproduced in U.N. Doc. A/C.6/120.

⁸ U.N. Doc. E/577.

⁹ Resolution 114(IV), adopted at the 6th session of the Economic and Social Council, March 2, 1949. The draft resolution recommended to the General Assembly may be found in U.N. Doc. A/630, General Assembly, 3rd Sess., Pt. I, Official Records, Plenary Meetings, Annexes, pp. 101-102; the draft Protocol is in Doc. A/C.6/210.

¹⁰ U.N. Doc. A/C.6/250. The question was considered at the 88th, 90th and 91st meetings of the 6th Committee, Oct. 30, Nov. 3 and 4, 1948. General Assembly, 3rd Sess., Pt. I, Official Records, 6th Committee, pp. 263-272, 283-291.

the Soviet Union and Poland supported the Haitian proposal, while those of the United Kingdom and France were opposed to it. The proposal was eventually defeated and the draft protocol was adopted by the General Assembly on November 18, 1948.¹¹ The colonial clause, with the formal amendments recommended by the Economic and Social Council, was retained in the convention.

3. *Convention on Genocide*

Hardly a fortnight after it had decided in favor of retaining an existing colonial clause in the Convention relating to Economic Statistics, the Sixth Committee had to deal again with this question in connection with the draft Convention on the Prevention and Punishment of the Crime of Genocide. The draft convention before the Sixth Committee was prepared by the Ad Hoc Committee on Genocide of the Economic and Social Council and submitted by the Council to the General Assembly.¹² Neither this draft, nor the drafts¹³ preceding it, namely, those by the Secretary General of the United Nations, by the United States and by France, contained any colonial clause.

In the course of discussions in the Sixth Committee,¹⁴ the representative of the United Kingdom proposed an amendment to add a new article providing:

Any High Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that High Contracting Party is responsible.¹⁵

The proposal of the United Kingdom was supported by the representatives of The Netherlands, Belgium and Greece. The representative of the Ukrainian Soviet Socialist Republic, however, submitted an amendment to the article proposed by the United Kingdom, so that it would read as follows:

¹¹ The draft protocol was embodied in the Report of the 6th Committee, U.N. Doc. A/713, General Assembly, 3rd Sess., Pt. I, Official Records, Plenary Meetings, Annexes, pp. 336-341. For text of resolution 255(III) and draft protocol thereto annexed, see General Assembly, 3rd Sess., Pt. I, Official Records, Resolutions, pp. 160-164. For proceedings in the plenary meeting, see General Assembly, 3rd Sess., Pt. I, Official Records, Plenary Meetings, pp. 494-498.

¹² The Ad Hoc Committee was composed of 7 members. For report of this Committee, including text of its draft, see U.N. Doc. E/794.

¹³ Secretary General's draft, U.N. Doc. E/447; United States draft, Doc. E/623; French draft, Doc. E/623/Add.1.

¹⁴ For proceedings, see General Assembly, 3rd Sess., Pt. I, Official Records, 6th Committee, 107th and 108th meetings, Oct. 15, 16, 1948, pp. 471-479.

¹⁵ U.N. Doc. A/C.6/236, penultimate paragraph.

The application of the present Convention shall extend equally to the territory of the State acceding to the Convention and to all territories in regard to which that State performs the functions of the governing and administering authority (including trust and other non-self-governing territories).¹⁶

This Ukrainian proposal was supported by the representatives of the Soviet Union, Egypt, Czechoslovakia, the Philippines and Syria.

The representative of Iran proposed that the General Assembly adopt a separate resolution, apart from the convention, stating:

The General Assembly recommends that Members of the United Nations administering dependent territories should take such measures as are necessary and feasible to enable the provisions of the present Convention to be extended to those territories as soon as possible.¹⁷

This proposal by Iran was received with favor by some delegations, notably those of the United Kingdom, France and Belgium.

When the three proposals quoted above were put to the vote, the Ukrainian amendment was rejected, while the United Kingdom draft article and the Iranian draft resolution were adopted.¹⁸ When the draft Convention on the Prevention and Punishment of the Crime of Genocide, together with the accompanying draft resolutions adopted by the Sixth Committee, was considered by the Plenary Meeting on December 9, 1948,¹⁹ the Soviet Delegation sought to revive the Ukrainian amendment rejected by the Sixth Committee. This attempt was defeated and the resolutions recommended by the Sixth Committee were adopted. Thus the colonial clause was, for the first time, inserted in a convention adopted by the General Assembly.²⁰

4. Protocols to Amend Agreement and Conventions for the Suppression of the White Slave Traffic and of Obscene Publications

Immediately after it had disposed of the draft Convention on Genocide, the Sixth Committee took up the question of the "transfer to the United

¹⁶ U.N. Doc. A/C.6/264.

¹⁷ U.N. Doc. A/C.6/633.

¹⁸ The texts of the resolutions and draft convention adopted by the 6th Committee may be found in the Report of the Committee, U.N. Docs. A/760 and A/760/Corr. 2, General Assembly, 3rd Sess., Pt. I, Official Records, Plenary Meetings, Annexes, pp. 494-504. The colonial clause originally proposed by the United Kingdom became Art. XII in the draft convention. The draft resolution originally proposed by Iran became resolution "C".

¹⁹ General Assembly, 3rd Sess., Pt. I, Official Records, Plenary Meetings, 178th and 179th meetings, pp. 814-852.

²⁰ The Soviet amendment is in U.N. Doc. A/766, par. 5, General Assembly, 3rd Sess., Pt. I, Official Records, Plenary Meetings, Annexes, p. 518. For final text of resolution 260(III) and convention, see General Assembly, 3rd Sess., Pt. I, Official Records, Resolutions, pp. 174-178; see also Supplement to this JOURNAL, p. 7.

Nations of the functions exercised by the French Government under the International Agreement of 18 May 1904 and the International Convention of 4 May 1910 for the Suppression of the White Slave Traffic, and under the International Agreement of 4 May 1910 for the Suppression of Obscene Publications.”²¹ The colonial clauses in the 1910 agreement and in the 1910 convention are substantially similar. They provide that should a contracting state desire the agreement or convention to come into force in one or more of its non-metropolitan territories, it shall so notify the French Government and the agreement or convention shall apply to such territories six months after such notification. They also provide for denunciation in respect of such territories.

The above-mentioned instruments came before the General Assembly, following the acceptance by the Economic and Social Council of a proposal by France to transfer to the United Nations certain functions, all formal in nature, performed by the French Government under the instruments.²² In compliance with the instructions of the Council, the Secretary General of the United Nations, in consultation with the French Government, drew up two draft protocols with suggested amendments to the instruments concerned and submitted them to the General Assembly for consideration. One of these draft protocols related to the International Agreement for the Suppression of the White Slave Traffic, signed at Paris on May 18, 1904, and the International Convention for the Suppression of the White Slave Traffic, signed at Paris on May 4, 1910; while the other referred to the Agreement for the Suppression of the Circulation of Obscene Publications, signed at Paris on May 4, 1910.

In the Sixth Committee the French Delegation introduced at the outset a draft resolution²³ to approve the draft protocols. The Soviet Delegation introduced an amendment to each of the colonial clauses referred to above, so as to provide identically as follows:

The application of the present Convention shall extend equally to the territory of the State signing or acceding to the Convention and

²¹ The texts of these Agreements and Convention are reproduced in U.N. Doc. A/639/Rev. 1, General Assembly, 3rd Sess., Pt. I, Official Records, Plenary Meetings, Annexes, pp. 131-140. The Agreement for the Suppression of the White Slave Traffic contains no colonial application clause. The colonial clause in the Convention for the Suppression of the White Slave Traffic is in Art. 11, *ibid.*, pp. 136-137; that in the Agreement for the Suppression of the Circulation of Obscene Publications is Art. 7, *ibid.*, pp. 139-140.

²² The French proposal was made at the 99th meeting of the 5th session of the Economic and Social Council, July 29, 1947. See Economic and Social Council, 2nd Year, 5th Sess., Official Records, pp. 105-110. For text of resolution 155(VII)D of the Economic and Social Council of Aug. 13, 1948, see Resolutions adopted by the Economic and Social Council, 7th Sess., 1948, pp. 32-36.

²³ Discussed at the 111th meeting. See General Assembly, 3rd Sess., Pt. I, Official Records, 6th Committee, pp. 510-518. The French draft resolution is in U.N. Doc. A/C.6/266.

to all territories in regard to which that State performs the functions of the governing and administering authority (including trust and other non-self-governing territories).²⁴

This proposal of the Soviet Delegation was opposed by the representative of France, who pointed out that the transfer proposed by his government was limited in scope, and that there was no question of amending the substance of the convention; ²⁵ the Soviet amendments did not come within the scope of the discussions because the Committee was at present dealing with a transfer of a limited nature and not with the substance of the instruments concerned.

The Sixth Committee rejected the Soviet amendments. The French draft resolution, together with the draft protocols, was adopted.²⁶ The colonial clauses were thus preserved.

When the draft protocols were considered in the plenary meetings, the Soviet Delegation again introduced the same amendments to the colonial clauses as those it proposed in the Sixth Committee. The French representative made it clear that his government, from whom the functions under the instruments were proposed to be transferred, would not be able to accept any changes of substance in the text of the agreements or of the convention. After a brief discussion, the amendments were rejected. The Protocols were adopted unanimously.²⁷

5. Protocol bringing under International Control Drugs Outside the Scope of the Convention of 1931

The question of the colonial clause arose for a fourth time in the first part of the third session of the General Assembly in connection with the draft "Protocol bringing under International Control Drugs outside the Scope of the Convention of 13 July 1931 for limiting the Manufacture and regulating the Distribution of Narcotic Drugs, as amended by the Protocol signed at Lake Success on 11 December 1946." Prepared by the Economic and Social Council, this draft ²⁸ contained in Article 8 a colonial clause providing that any state may, by notification to the Secretary General of

²⁴ U.N. Doc. A/C.6/274.

²⁵ The French representative cited as evidence a letter from the Secretary General of the French Ministry of Foreign Affairs to the Secretary General of the United Nations, in which the former expressed agreement with the text of the draft protocols. General Assembly, 3rd Sess., Pt. I, Official Records, Annexes, pp. 129, 130.

²⁶ For texts of resolution and draft protocols as adopted by the 6th Committee, see Report of the Committee, U.N. Doc. A/741, in General Assembly, 3rd Sess., Pt. I, Official Records, Plenary Meetings, Annexes, pp. 435-442.

²⁷ General Assembly, 3rd Sess., Pt. I, Official Records, Plenary Meetings, 169th meeting, pp. 683-687. The votes on the Soviet amendments were 12 for, 24 against, with 15 abstentions; and 14 for, 24 against, with 14 abstentions.

²⁸ Resolution 159(VII)I, Aug. 3, 1948; see Resolutions adopted by the Economic and Social Council, 7th Sess., pp. 42-45.

the United Nations, extend the application of the protocol to all or any of its territories for the foreign relations of which it is responsible.

In the consideration of the draft protocol in the Third Committee, the representative of the Soviet Union proposed that the afore-mentioned colonial clause should be amended so as to read as follows:

The scope of the present Protocol shall extend equally both to the territory of the signatory and acceding State and to all territories in relation to which the State in question carries out the functions of an administering and governing authority (including Trust and other Non-Self-Governing Territories).²⁹

The representative of Belgium proposed that the words in the Council's draft Article 8 "for the foreign relations of which it is responsible" should be replaced by "for which it has international responsibility." This was accepted by the Committee without a vote. The Committee eventually voted to reject the Soviet amendment and to adopt Article 8 as drafted by the Economic and Social Council and amended by the Belgian proposal. The draft protocol containing this article was then approved unanimously.³⁰

In order to meet the point raised by the Soviet Delegation, the Committee later decided to add to the draft resolution³¹ to which the draft protocol was to be annexed provisions urging all contracting states to extend the application of the protocol to territories "which they represent in the international field, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories"; and to communicate to the Secretary General the names of territories to which the application of the convention is not extended, together with reasons.

At the plenary meeting³² where the draft resolution, with the draft protocol, was discussed, the Soviet representative declared that his delegation would not vote against the draft protocol as a whole but reserved its position on Article 8 (the colonial clause). The draft resolution, with the draft Protocol, was adopted.³³

²⁹ For proceedings, see General Assembly, 3rd Sess., Pt. I, Official Records, 3rd Committee, 86th and 87th meetings, Sept. 29, 30, 1948, pp. 7-22. The Soviet proposal is in U.N. Doc. A/C.3/208, General Assembly, 3rd Sess., Pt. I, Official Records, 3rd Committee, p. 10.

³⁰ The vote on the Soviet amendment was 17 for, 25 against, with 11 abstentions. That on the Economic and Social Council draft article, as amended by the proposal of Belgium, was 33 for, 8 against, with 12 abstentions.

³¹ U.N. Doc. A/C.3/210/Rev.1, General Assembly, 3rd Sess., Pt. I, Official Records, 3rd Committee, Annexes, p. 2. For the draft resolution, see Report of the 3rd Committee, U.N. Docs. A/666, and Corr.1, General Assembly, 3rd Sess., Pt. I, Official Records, Plenary Meetings, Annexes, pp. 207-211.

³² General Assembly, 3rd Sess., Pt. I, Official Records, Plenary Meetings, 150th meeting, Oct. 8, 1948, pp. 348-355.

³³ Resolution 211(III)A, with text of Protocol, may be found in General Assembly, 3rd Sess., Pt. I, Official Records, Resolutions, pp. 62-66. The colonial clause (Art. 8) reads as follows:

6. *Convention relating to Traffic in Persons and Prostitution*

The year 1949 saw the colonial clause take on a new form and substance. For the first time a provision was included in an international multilateral instrument adopted by the General Assembly making it applicable *ipso facto* to all non-metropolitan territories of the contracting parties, and it is interesting to note that this was done through a provision defining the word "State" as including all the colonies and trust territories of a contracting state and all territories for which such state is internationally responsible. This happened in connection with the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, considered and adopted by the General Assembly at its fourth session in 1949.

The convention was intended to unify the four existing international instruments³⁴ for the suppression of the traffic in women and children. The first draft³⁵ of the convention was prepared by the Secretariat of the United Nations. This contained a colonial clause, namely, Article 26, providing that any state may declare that the convention shall extend to all or any of the territories for which it has international responsibility. On the basis of this first draft, the Social Commission of the Economic and Social Council drew up a second draft in which two paragraphs were added to the original colonial clause, which now became Article 27.³⁶ These paragraphs would require the parties to the convention to take as soon as possible the necessary steps to extend the application of the convention to their dependent territories, "subject, where necessary for constitutional reasons, to the consent of the governments of such territories." It was further provided that the Secretary General should communicate the convention to the parties for transmission to such territories. Article 24 stipulated, in part, that the convention should also be open for signature or acceptance on behalf of any trust territory of which the United Nations was the administering authority, and on behalf of the Free Territory of Trieste, "and for the purposes of this Convention, the word 'State' shall include any such terri-

"Any State may, at the time of signature or the deposit of its formal instrument of acceptance or at any time thereafter, declare by notification addressed to the Secretary-General of the United Nations that the present Protocol shall extend to all or any of the territories for which it has international responsibility; and this Protocol shall extend to the territory or territories named in the notification as from the thirtieth day after the date of receipt of this notification by the Secretary-General of the United Nations."

³⁴ These were: (a) International Agreement of May 18, 1904, for the Suppression of the White Slave Traffic; (b) International Convention of May 4, 1910, for the Suppression of the White Slave Traffic; (c) International Convention of Sept. 30, 1921, for the Suppression of the Traffic in Women and Children; and (d) International Convention of Oct. 11, 1933, for the Suppression of the Traffic in Women of Full Age. ECOSOC Resolution 155(VII)E, Aug. 13, 1948.

³⁵ U.N. Doc. E/1072.

³⁶ Report of Social Commission, 4th Sess., U.N. Doc. E/1359, p. 34.

tory." The draft of the Social Commission was submitted to the General Assembly by the Economic and Social Council.³⁷

At the fourth session of the General Assembly in 1949, the Third Committee, upon the proposal of the Ukrainian representative, decided to delete the colonial clause, that is, Article 27, in the Social Commission draft and to substitute for the sentence in Article 24 relating to trust territories the following:

For the purposes of the present Convention the word "State" shall include all the colonies and trust territories of a State signatory to or accepting the Convention and all other territories for which such State is internationally responsible.³⁸

This provision, which now became part of Article 23 in the draft, together with several other articles of the draft convention, was referred to the Sixth Committee for its consideration. Upon the advice of the latter Committee, it underwent some drafting changes and became the final paragraph of Article 23, reading as follows:

For the purposes of the present Convention the word "State" shall include all the colonies and trust territories of a State signatory or acceding to the Convention and all the territories for which such State is internationally responsible.³⁹

At the plenary meetings, when the draft convention drawn up by the Third Committee was considered, the representative of the United Kingdom introduced an amendment designed to bring Article 23 (which defines the word "State") back to what was adopted by the Social Commission. He further proposed to restore the text of the old Article 27, that is, the colonial clause which had been deleted in the Third Committee upon the proposal of the Ukrainian representative. Both of these amendments were rejected, each by a heavy majority. The General Assembly then voted to adopt the draft convention as drawn up by the Third Committee.⁴⁰ The United Kingdom and France were alone in voting against the draft convention as a whole.

³⁷ Resolution 243(IX)B, July 23, 1949, of the Economic and Social Council, U.N. Doc. E/1458.

³⁸ U.N. Doc. A/C.3/L.10, General Assembly, 4th Sess., Official Records, 3rd Committee, Annexes, p. 23. The same amendments were proposed by the Soviet representative in the Social Commission but were rejected. See U.N. Doc. E/1359, pars. 19 and 20. For text of Art. 24 as adopted, see U.N. Doc. A/C.6/333. For proceedings of the 3rd Committee, see General Assembly, 4th Sess., Official Records, 3rd Committee, 246th-248th meetings, pp. 59-71.

³⁹ Report of 3rd Committee of the General Assembly, U.N. Doc. A/1164.

⁴⁰ For proceedings in the plenary meetings, see General Assembly, 4th Sess., Official Records, Plenary Meetings, 263rd and 264th meetings, Dec. 2, 1949, pp. 461-471. For final text of convention, see General Assembly, 4th Sess., Official Records, Resolutions, pp. 33-35 (Resolution 317(IV)). The convention, according to Art. 28, supersedes the instruments enumerated in note 34.

7. *Convention on the Declaration of Death of Missing Persons*

In pursuance of a resolution⁴¹ of the General Assembly, the United Nations convened an international conference of government representatives in March, 1950, at Lake Success, to draw up a Convention on the Declaration of Death of Missing Persons.⁴²

The conference used as a basis of discussion a draft convention prepared by the Ad Hoc Committee on Declaration of Death of Missing Persons, established by the Economic and Social Council.⁴³ Article 12 (on signatures and acceptances), paragraph 4, of this draft provided:

The word "State" as used in this Article shall be understood to include the territories for which each State party to the present Convention bears international responsibility.

This provision was substantially the same as Article 23 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, discussed above. It would have made the convention applicable *ipso facto* to all non-metropolitan territories of states parties to the convention.

At the conference, the representative of Belgium proposed an amendment to add to the provision quoted above an additional clause:

unless the State concerned, on signing or accepting the Convention, stipulates that it proposes to restrict the application of the Convention to its metropolitan territory.⁴⁴

The representative of the United Kingdom pointed out that the Belgian amendment did not provide for the possibility of contracting parties extending the application of the convention to their overseas territories if they wished to do so later. He therefore suggested that it should be completed by a further addition as follows:

Any State making such a stipulation may at any time thereafter, by notification to the Secretary-General, extend the application of the present convention to any or all of the territories for which it bears international responsibility.

This suggestion was accepted by the Belgian representative, and the two additional provisions consequently became a joint Belgium-United Kingdom amendment.

⁴¹ Resolution 369(IV), adopted at the 4th session, Dec. 3, 1949. General Assembly, 4th Sess., Official Records, Resolutions, pp. 65-66.

⁴² The conference is officially known as the "United Nations Conference on Declaration of Death of Missing Persons." It was attended by representatives of thirty states.

⁴³ Resolution 209(VIII), March 2, 1949, U.N. Doc. E/1220. The draft of the Ad Hoc Committee is in Doc. E/1368.

⁴⁴ U.N. Doc. A/Conf.1/L. 13, par. 3. For proceedings, see U.N. Docs. A/Conf.1/SR. 9 and 10.

The representative of France raised doubts about the expression "metropolitan territory" in the Belgian amendment. He expressed preference for a more flexible phraseology "which would take closer account of the very delicate legal relations which it had with certain territories such as the Saar, for example, which was neither a metropolitan territory nor a colony." He accordingly suggested that the Belgian amendment be revised to read: "unless in accepting the Convention, the State stipulates its intention to exclude certain of its territories."

This suggestion was agreed to by the sponsors of the joint amendment.

The conference decided to adopt the amendments proposed by Belgium, the United Kingdom and France.⁴⁵ Upon the recommendation of the Drafting Committee,⁴⁶ this clause became paragraph 3 of Article 13 (on accession). It reads as follows:

3. The word "State" as used in the present Convention shall be understood to include the territories for which each Contracting State bears international responsibility, unless the State concerned, on acceding to the Convention, has stipulated that the Convention shall not apply to certain of its territories. Any State making such a stipulation may at any time thereafter, by notification to the Secretary-General, extend the application of the Convention to any or all of such territories.

The draft convention, with the above colonial clause, was eventually adopted by the conference on April 6, 1950.⁴⁷

8. *Draft International Covenant on Human Rights*

The question of inserting a colonial clause in the proposed Covenant on Human Rights was raised first in December, 1947, by the representative of the United Kingdom.⁴⁸ A provision on this subject was inserted in the draft International Bill of Human Rights of December 11, 1947 (Article 23), and in the draft International Covenant on Human Rights adopted by the Commission on Human Rights on December 17, 1947 (Article 25).⁴⁹ The colonial clause in the draft Covenant was further redrafted by the Drafting Committee of the Commission on Human Rights in May, 1948, as follows:

A State party to this Covenant may at the same time of its accession thereto or at any time thereafter by notification addressed to the Secretary-General of the United Nations declare that this Covenant shall extend to any of the territories for the international relations of which it is responsible, and the Covenant shall extend to the territories named

⁴⁵ The vote was 8 to 7, with 6 abstentions. U.N. Doc. A/Conf.1/SR.10, p. 7.

⁴⁶ Report of the Drafting Committee, U.N. Doc. A/Conf.1/7, p. 11.

⁴⁷ The vote was 20 for, none against, with 1 abstention.

⁴⁸ U.N. Doc. E/CN.4/AC.3/SR.8, p. 15.

⁴⁹ U.N. Docs. E/CN.4/56, p. 13, and E/600, p. 29.

in the notification as from the thirtieth day after the date of receipt by the Secretary-General of the United Nations of the notification. The Contracting States undertake, with respect to those territories on behalf of which they do not accede to this Covenant at the time of their accession, to seek the consent at the earliest possible moment of the Government of such territories and to accede forthwith on behalf of and in respect of each such territory, if and when its consent has been obtained.⁵⁰

Though the Drafting Committee favored this text, it decided to transmit to the Commission also the following alternative text, proposed by the delegate of the Soviet Union:

The conditions of the present Covenant shall extend or be applicable both to the metropolitan territory [of a State] which is signatory to the present Covenant, as well as to all the other territories (non-self-governing, trust, and colonial territories) which are being administered or governed by the metropolitan power in question.⁵¹

At the fifth session of the Commission on Human Rights the representative of the Soviet Union proposed that in the first line of the Commission's text of Article 25, the word "may" be changed to "shall." Two other versions of this clause were presented by the representatives of the United States and the Philippines.⁵² At the sixth session of the Commission additional drafts were presented by Australia and the United Kingdom, and the Commission decided to transmit all these drafts, without discussion, to the Economic and Social Council for its consideration.⁵³ The Council, at its eleventh session, found it necessary to transmit the draft Covenant to the General Assembly "with a view to reaching policy decisions" on several points, including the desirability of a special article on the applicability of the Covenant "to Non-Self-Governing and Trust Territories."⁵⁴

The question was considered by the Third Committee of the General Assembly at its fifth session.⁵⁵ It approved by a vote of 30 to 11, with 8 abstentions, a resolution requesting the Commission on Human Rights to include the following article in the International Covenant on Human Rights:

⁵⁰ U.N. Doc. E/CN.4/95, p. 35.

⁵¹ *Ibid.*, p. 36. See also U.N. Doc. E/800, p. 34, ECOSOC, 3rd Year, 7th Sess., Official Records, Supp. No. 2, p. 28.

⁵² ECOSOC, 4th Year, 9th Sess., Official Records, Supp. No. 10, p. 27.

⁵³ Art. 44 of the first draft International Covenant on Human Rights, *idem*, 5th Year, 11th Sess., Supp. No. 5, pp. 21-22.

⁵⁴ U.N. Doc. E/1849, p. 29. In addition to the report of the Commission on Human Rights, the Council had before it a report by the Secretary General dealing with previous action taken by the United Nations in connection with federal and colonial clauses, U.N. Doc. E/1721.

⁵⁵ U.N. Docs. A/C.3/SR.294-296 and 302.

The provisions of the present Covenant shall extend to or be applicable equally to a signatory metropolitan State and to all the territories, be they Non-Self-Governing, Trust, or Colonial Territories, which are being administered or governed by such metropolitan State.⁵⁶

On December 4, 1950, the General Assembly approved the resolution proposed by the Third Committee. The representative of the United Kingdom stated at that time that the effect of this decision may be "to delay unduly the United Kingdom Government's accession to the covenant and its application to several territories." The Australian representative felt that the decision to omit a colonial application clause took no real account "of the constitutional difficulties which will face certain countries in the application of the covenant to the territories for which they are responsible."⁵⁷

II. THE FEDERAL CLAUSE

Akin to the question of the colonial clause is that of the federal clause which regulates the extent of the obligations of a contracting state having a federal form of government in respect of the application of a multilateral instrument to its component parts.⁵⁸ In the General Assembly of the United Nations the question first arose at its fourth session in 1949 in connection with the Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.⁵⁹ In the Social Commission of the Economic and Social Council, which considered a draft prepared by the Secretariat of the United Nations, the representative of the United States proposed for inclusion a federal clause. This, however, was withdrawn in order to expedite the work of the Commission.⁶⁰ When the draft convention came before the Social Committee of the Economic and Social Council, the Committee decided that the United States proposal should be referred to the General Assembly for consideration.⁶¹

During the fourth session of the General Assembly in 1949, the Delegation of the United States in the Third Committee again submitted the same proposal for the inclusion of a federal clause in the draft convention which

⁵⁶ U.N. Doc. A/1559, p. 40.

⁵⁷ U.N. Docs. A/1622 and A/P.V.317.

⁵⁸ A classic example of the federal clause is that provided in the Constitution of the International Labor Organization, Art. 19, par. 7.

⁵⁹ As to the background of the convention, see Section 6, *supra*.

⁶⁰ The draft by the Secretariat (U.N. Doc. E/1072) did not contain a federal clause. U. S. proposal is in U.N. Doc. E/CN.5/115/Add.1. For proceedings in Social Commission, see U.N. Doc. E/CN.5/SR.76. See also Report of the 4th session of the Social Commission, U.N. Doc. E/1359, par. 22. For text of the draft by the Social Commission, see U.N. Doc. E/1458.

⁶¹ For proceedings of the Social Committee, see U.N. Doc. E/AC.7/SR.82, pp. 13, 14. The report of the Committee (U.N. Doc. E/1402) was considered by the Economic and Social Council at its 9th session, 1949; see U.N. Doc. E/SR.306. The draft was adopted by resolution 243(IX)B, of the Council, ECOSOC, 9th Sess., Official Records, Resolutions, pp. 42-50.

it had withdrawn in the Social Commission of the Economic and Social Council. This proposal was later referred by the Third Committee to the Sixth Committee for consideration.⁶² The Sixth Committee referred the proposal to a subcommittee, which in turn appointed a working group to consider the problems involved. In the discussions in the working group, the representative of the United States accepted certain amendments proposed by the representative of France so that the article read as follows (the French amendments being italicized):

In the case of a federal State *or non-unitary State*, the following provisions shall apply:

(a) With respect to any articles of this Convention which are determined in accordance with the constitutional processes of that State to be appropriate in whole or in part for federal action, the obligations of the federal government shall to this extent be the same as those of parties which are not federal States;

(b) In respect of articles which are determined in accordance with the constitutional processes of that State to be appropriate in whole or in part for action by the constituent states, provinces, or cantons *or territories*, the federal government shall bring such articles, with favorable recommendation, to the notice of the appropriate authorities of the states, provinces or cantons at the earliest possible moment.

Neither the working group nor the subcommittee, however, took any decision with respect to the proposal, but merely referred the matter back to the Sixth Committee. In the course of consideration in the Sixth Committee an amendment was jointly submitted by India, Australia and Argentina, proposing that the article should read as follows:

In the case of a federal State, the following provisions shall apply:

(a) in respect of each article of this Convention whose implementation is considered by the federal State to be appropriate wholly or partly for federal action or central government action, the obligations of a federal or central government shall to this extent be the same as those of Parties which are non-federal States.

(b) in respect of each article of this Convention whose implementation is considered by the federal State to be wholly or partly within the jurisdiction of a unit of the federal State (whether designated as states, provinces or cantons), the federal Government concerned shall bring this to the knowledge of the competent authorities of that unit and will recommend its adoption.

After a lengthy discussion, the Sixth Committee voted in the affirmative on the question whether the convention should contain a federal clause. In spite of this, both the United States amendment and the joint amendment

⁶² U. S. proposal is in U.N. Doc. A/C.3/L.13, amendment to Art. 30, General Assembly, 4th Sess., Official Records, 3rd Committee, Annexes, pp. 24, 25. For proceedings in the 3rd Committee, see Official Records, 3rd Committee, Summary Records, p. 30; see also memorandum from 3rd Committee to 6th Committee, U.N. Doc. A/C.3/526, in Official Records, 3rd Committee, Annexes, pp. 18-22.

referred to were rejected. When the Third Committee considered the report of the Sixth Committee, an attempt was made by the representative of France to revive the question of the federal clause, but the Committee decided not to consider the question. The convention, as finally adopted by the General Assembly, therefore contained no provision giving special consideration to federal states.⁶³

The inclusion of a federal clause was also considered in connection with the draft International Covenant on Human Rights. Such a clause was first inserted, on proposal of the United States, in the draft prepared by the Working Group on the Convention on Human Rights in December, 1947.⁶⁴ As incorporated in Article 24 of the draft Covenant approved at the second session of the Commission on Human Rights, this clause read as follows:

In the case of a Federal State, the following provisions shall apply:

(a) With respect to any Article of this Covenant which the federal government regards as wholly or in part appropriate for federal action, the obligations of the federal government shall, to this extent, be the same as those of parties which are not federal States;

(b) In respect of Articles which the federal government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent States, Provinces or Cantons, the federal government shall bring such provisions, with a favourable recommendation, to the notice of the appropriate authorities of the States, Provinces or Cantons.⁶⁵

Various modifications in this text were proposed at the fifth and sixth sessions of the Commission on Human Rights in 1949 and 1950, and the Commission referred the various drafts to the Economic and Social Council for consideration.⁶⁶ The Council referred the matter to the General Assembly for a policy decision,⁶⁷ and on December 4, 1950, the latter approved a resolution calling upon the Economic and Social Council

⁶³ For proceedings of the 6th Committee, see General Assembly, 4th Sess., Official Records, 6th Committee, Summary Records, pp. 170, 321, 405-418. The report of the working group does not bear a document number and has not been distributed. Report of subcommittee, Sec. II, in U.N. Doc. A/C.6/L.88, Official Records, 6th Committee, Annexes, pp. 38-39. Joint amendment by India, Australia and Argentina is U.N. Doc. A/C.6/L.97, Official Records, 6th Committee, Summary Records, p. 414. For proceedings of the 3rd Committee, see Official Records, 3rd Committee, Summary Records, pp. 174, 175. The draft convention was adopted at the 264th plenary meeting; see Official Records, Plenary Meetings, Summary Records, p. 471.

⁶⁴ U.N. Docs. E/CN.4/37, p. 6, and E/CN.4/56, p. 13.

⁶⁵ Economic and Social Council, 3rd Year, 6th Sess., Official Records, Supp. No. 1, p. 29. An identical text was embodied in the draft Covenant considered at the third session of the Commission on Human Rights. U.N. Docs. E/CN.4/95, p. 35, and E/800, p. 34, ECOSOC, 3rd Year, 7th Sess., Official Records, Supp. No. 2, p. 27.

⁶⁶ Economic and Social Council, 4th Year, 9th Sess., Official Records, Supp. No. 10, pp. 25-26; *idem*, 5th Year, 11th Sess., Supp. No. 5, pp. 20-21 (new Art. 43).

⁶⁷ Resolution 303(XI)I, U.N. Doc. E/1849, p. 29.

to request the Commission on Human Rights to study a federal State article and to prepare, for the consideration of the General Assembly at its sixth session, recommendations which will have as their purpose the securing of the maximum extension of the Covenant to the constituent units of federal States, and the meeting of the constitutional problems of federal States.⁶⁸

III. REASONS FOR AND AGAINST THE COLONIAL AND FEDERAL CLAUSES

From the foregoing analysis, it will be seen that no consistent practice has yet been developed in the United Nations in respect of the colonial clause or of the federal clause. Furthermore, the variations in practice in connection with the several multilateral instruments reviewed above do not seem to result from considerations of the nature of the subject-matter of the instruments concerned. It may take some time before any definite practice will evolve within the framework of the United Nations. In the course of the deliberations in the United Nations, various reasons have been advanced for and against the two clauses. The following are the main arguments:

Those delegations in favor of making special provisions excepting dependent territories from automatic application of non-political multilateral instruments based their arguments, in the first place, on constitutional grounds. The United Kingdom,⁶⁹ a most consistent advocate of the colonial clause, for instance, insisted on all occasions that many of her colonial territories possessed a "greater or lesser degree of autonomous self-government." Each territory has its own "self-contained government," "having its own legislature, its own executive and its own juridical and financial system."

Although it retains an ultimate sovereignty in regard to its colonial territories, and although, of course, it speaks for and represents its colonial territories in international matters, the United Kingdom Government is not, in general, responsible for legislation in the colonial territories.

The colonial clause would enable the colonies, "by their own governments and their own legislatures, to notify their parent government—in this case, the United Kingdom Government—that they desire to accede to the Convention and that they have made whatever adjustment in their law or administration as may have been required."

The Delegation of France took a similar view. At the third session of the General Assembly, the French representative⁷⁰ in the Third Commit-

⁶⁸ U.N. Docs. A/1620, and A/P.V.317.

⁶⁹ See remarks of the United Kingdom representative at the 96th Plenary Meeting of the General Assembly. General Assembly, 2nd Sess., Official Records, Plenary Meetings, Vol. I, pp. 341-345. See also U.N. Doc. A/C.3/SR.294, p. 5.

⁷⁰ General Assembly, 3rd Sess., Pt. I, Official Records, 6th Committee, Summary Records, p. 289. See also U.N. Doc. A/C.3/SR.294, p. 9.

tee, in connection with the International Convention relating to Economic Statistics, pointed out that the Charter of the French Union "contained a clause prohibiting the adoption of uniform legislation for all territories of the Union." A "proposed international legislation might affect French overseas territories in a different way from metropolitan France, which must have regard to the interests of individual territories." He stated that:

In cases where individual territories possessed their own administration, France must proceed with care before securing the participation of those territories in international agreements. Even in cases where France had the legal power to act, it was morally bound to take the interests of those territories into consideration.

Pursuing the same line of reasoning, the representative of the United Kingdom argued that the omission of the colonial clause "would be wholly inimical to the progressive development of autonomous constitutional government in the so-called colonial territories."⁷¹ The representative of Lebanon gave as his reason in support of the colonial clause that

the United Nations should try, as far as possible whenever it had the opportunity, to reduce the possibilities of interference by metropolitan countries in the internal affairs of the non-self-governing territories.⁷²

Article 73 of the Charter was also relied upon as a reason in supporting the colonial clause. Under this provision, the interests of the inhabitants of the non-self-governing territories are recognized as paramount and the Members administering such territories undertake to develop self-government, to take due account of the political aspirations of the peoples and to assist them in the progressive development of their free political institutions. The representative of the United Kingdom inferred that the colonial clause, which would enable the non-self-governing peoples to express their views regarding their participation in an international instrument, was "in perfect accord with the spirit and the letter of the Charter."⁷³

The restrictive colonial clause was also defended on another ground. In the words of the representative of the United Kingdom, the clause would enable the colonial Powers to accede to the convention at once, so far as their metropolitan areas are concerned, "without the delay which would be occasioned by first making sure that all the governments of all of their colonial territories are in a position at once to accede as well."⁷⁴ Conversely speaking, in the absence of a colonial clause, failure of one dependent ter-

⁷¹ General Assembly, 2nd Sess., Official Records, Plenary Meetings, Vol. I, p. 342.

⁷² General Assembly, 4th Sess., Official Records, 3rd Committee, Summary Records, p. 71.

⁷³ General Assembly, 3rd Sess., Pt. I, Official Records, 6th Committee, Summary Records, p. 294.

⁷⁴ General Assembly, 2nd Sess., Official Records, Plenary Meetings, p. 343. See also U.N. Doc. E/AC.7/SR.152, p. 12.

ritory to accept an instrument would prevent the metropolitan Power and her other territories from acceding to the instrument.

Those who were against the restrictive colonial clause emphasized that dependent territories, more than the metropolitan Powers, were in need of the benefits which international non-political instruments would confer. The effectiveness of international instruments would be diminished if they were not made applicable to dependent territories. As to the constitutional position of the dependent territories, it was contended by the representative of the Soviet Union⁷⁵ that it was an "internal question" for each of the colonial Powers to reach agreement with its colonial authorities for the implementation of an international instrument within its own territorial complex. The representative of Yugoslavia, in opposing the argument based on constitutional grounds, expressed the view that "under the Charter, Member States had accepted the obligation to bring their constitutions into line with the provisions of the Charter."⁷⁶ The representative of Pakistan⁷⁷ pointed out that in the actual operation of the colonial system, consultation with the colonial territories in regard to the acceptance of an international instrument was unnecessary or was a mere formality. The colonial Powers took very many decisions on behalf of their dependent territories on the ground that the peoples of those territories were not sufficiently advanced to decide for themselves. They should therefore be able to decide for the territories also as to the acceptance of international instruments which were for the benefit of the dependent peoples. It was argued, furthermore, that the absence of a colonial clause would not prevent the colonial Powers, if they wished to do so, from consulting their dependent territories. The representative of Haiti⁷⁸ argued that "colonial and trust territories had no other will than the will of the mother countries or Administering Authorities." The representative of India also expressed his belief that there was no instance of the refusal of a colonial legislature "to enact laws upon which the metropolitan country insisted."⁷⁹

Articles 73 and 76 of the Charter were also relied upon as a ground for opposing the colonial clause. The representative of Poland,⁸⁰ for instance, said that the exclusion of the dependent territories from the application of an international instrument, such as those which the General Assembly was preparing, would tend to perpetuate backward conditions there "in viola-

⁷⁵ General Assembly, 2nd Sess., Official Records, Plenary Meetings, p. 347.

⁷⁶ U.N. Doc. A/C.3/SR.294.

⁷⁷ General Assembly, 2nd Sess., Official Records, Plenary Meetings, pp. 353, 354. See also *idem*, 5th Sess., Official Records, 3rd Committee, Summary Records, p. 160.

⁷⁸ General Assembly, 3rd Sess., Pt. I, Official Records, 6th Committee, Summary Records, p. 264.

⁷⁹ U.N. Doc. E/AC.7/SR.153. See also U. N. Doc. A/C.3/SR.294, p. 7.

⁸⁰ General Assembly, 4th Sess., Official Records, 3rd Committee, Summary Records, pp. 60, 61; *idem*, 5th Sess., Official Records, 3rd Committee, Summary Records, p. 158.

tion of Articles 73 and 76 of the Charter. Such conditions would impede the political, economic, social and educational advancement of the inhabitants, whereas the Members of the United Nations which had responsibilities for the administration of such territories had pledged themselves to promote their well-being." The representatives of the Philippines and of the Soviet Union also made reference to Articles 73 and 76 of the Charter.⁸¹ The representative of Chile expressed the view that the Covenant on Human Rights should apply automatically to the trust territories as they are to be administered as part of metropolitan territories; he also favored the extension of the Covenant to colonial territories as "it was unthinkable that non-self-governing territories would oppose by democratic processes the application to their people of the freedoms guaranteed by the Covenant."⁸²

With regard to the federal clause, many of the arguments used in respect of the colonial clause were advanced for and against it. In the course of the consideration of the draft Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the United States and Canada, having a federal form of government, urged its inclusion. France, although not a federal state, pleaded the constitutional system of the French Union as a reason for favoring the federal clause. The representative of the United Kingdom claimed that the federal clause proposed for inclusion in the draft convention—which, as amended on the proposal of France, had been phrased to be applicable to non-unitary as well as federal states—would apply to the United Kingdom. He therefore expressed support for its inclusion.

The main argument in favor of the federal clause was, as stated by its chief exponent, the representative of the United States, that the questions covered by the convention under discussion were in many respects within the competence of the legislative organs of the component states. Before the United States could sign the convention, therefore, its obligations must be clearly defined, when those obligations affected matters which were within the competence of the state governments and not within that of the central authority.⁸³

As against this point of view, the representative of the Soviet Union contended that under the Constitution of the United States treaties were the supreme law of the land. Special legislative measures therefore did not seem necessary to enable the United States Government to become a party to the convention: what it should appropriately do before signing the con-

⁸¹ General Assembly, 4th Sess., Official Records, 3rd Committee, Summary Records, p. 62; U.N. Doc. A/C.3/SR.294, p. 14.

⁸² U.N. Doc. E/AC.7/SR.151, pp. 14-15.

⁸³ General Assembly, 4th Sess., Official Records, 6th Committee, Summary Records, p. 405.

EDITORIAL COMMENT

THE "UNITING FOR PEACE" RESOLUTION OF THE UNITED NATIONS¹

On November 3, 1950, the General Assembly of the United Nations adopted by an overwhelming vote (52 to 5) a resolution awakening dormant powers which place it alongside of, or possibly superior to, the Security Council as the executive body of the United Nations in preserving and restoring peace. It permits the Assembly to do much of what the Council was authorized to do under Chapter VII of the Charter. This has been called the most momentous action ever taken by the General Assembly. The five Soviets voted against the resolution and India and Argentina abstained. This epochal action was a result of the organic imbecility of the Security Council whereby the Soviets obtained a strangle-hold on the proceedings through the veto and other tactics. When this grip was perchance loosened in June by the boycotting absence of the Soviet representative, the Security Council was able to act with facility and vigor sufficient to the Korean crisis in its resolutions of June 25 and 27, 1950. But when the Soviet Union returned to the Council on August 1, further action in respect of Korea was stalled for thirty-one days by maneuvers of the Soviet president.

The resolution, labeled "Uniting for Peace":

(1) Resolves that "if the Security Council because of lack of unanimity of its permanent members fails to exercise its primary responsibility" as to the maintenance of international peace and security in case of a "threat to the peace, breach of the peace or act of aggression," the General Assembly shall consider the matter immediately with a view to making "appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression, the use of armed force when necessary to maintain and restore international peace and security." If not in session, an emergency session may be called within twenty-four hours upon request of the Security Council by vote of any seven members, or by a majority of the Members of the United Nations.

(2) Establishes a Peace Observation Commission or "peace patrol" which for 1951 and 1952 shall be composed of fourteen Members (named) which "could observe and report on the situation in any area where there exists international tension . . . likely to endanger the maintenance of international peace and security." The Commission may be utilized upon a vote of two-thirds of the Members of the Assembly present and voting, if the Security Council is not exercising its functions as to the same matter. It may also be utilized by the Security Council.

¹ Supplement to this JOURNAL, p. 1.

(3) Recommends that "each Member maintain within its national armed forces elements so trained, organized and equipped that they could promptly be made available"² for service in behalf of the United Nations upon recommendation of the Security Council or General Assembly without prejudice to the right of self-defense under Article 51. A panel of military experts appointed by the Secretary General is to be made available to Members for technical military advice.

(4) Establishes a Collective Measures Committee of fourteen Members (named) to study and report by September 1, 1951, on methods to maintain and strengthen international peace and security, including consideration of (3) above, as well as collective self-defense and regional arrangements under Articles 51 and 52.³

While the United Nations prior to last June had to its credit several accomplishments to ease tensions and preserve peace, they have all been acts of moral persuasion or acts short of physical compulsion. Witness, among others, the action in the Balkans and Greece, Iran, Indonesia, Israel and South African. The June resolutions of the Security Council concerning the attack upon the Republic of Korea were the first occasions in history when an international organization as such used force to stop force. The resolution of November 3, 1950, proposes to perpetuate this advanced position taken by the Security Council under Chapter VII of the Charter.

The elements of this epoch-making resolution are not new. They have been expressed in various quarters heretofore. In this relation it is interesting to note particularly the Thomas-Douglas proposal (Senate Concurrent Resolution 52, July 8, 1949). This resolution proposed a Convention under Article 51 of United Nations Members to provide, in the event the Security Council is prevented from fulfilling its duties because of its voting procedures, for the use of force against an aggressor upon a call of two-thirds of the General Assembly, including three of the Big Five Powers, and for specification in advance of certain military, naval and air components for the use of the Security Council or the General Assembly.

Finally, on September 20, 1950, Secretary Acheson at the Fifth Session of the General Assembly outlined the four main features above indicated. Mr. Dulles of the American Delegation was selected to present the resolution and engineer its passage through the Political and Security Committee and the Assembly. He pointed out strikingly that the June resolutions

² On this point Mr. Dulles in the Political and Security Committee stated: "There was no question of binding commitments for the future," and each Member "would continue to be able to avail itself of all of its armed forces" for use under Article 51. "Since the Security Council had not taken the initiative prescribed by Article 43 the Member States should now be invited to undertake some first steps without awaiting further negotiation attempts in the Security Council." General Assembly, Fifth Sess., Official Records, First Committee, 354th meeting (U.N.Doc. A/C.1/SR.354), p. 64.

³ In the Political and Security Committee, Mr. Dulles said the draft resolution involved "no objectives or methods that were not in conformity with the Charter into which new life should be breathed without further delay." *Ibid.*

regarding Korea and the enforcement action of the Security Council were possible only because of three accidental circumstances: the elimination of the veto due to the absence of Russia from the Security Council, the presence of considerable armed forces stationed nearby in Japan and vicinity, and a United Nations Commission on the spot in Korea to report the facts of aggression. The purpose of the resolution is to make these accidental conditions permanent in preparation for any recurrence of aggression anywhere in the world.

It remains to be seen whether the plan will work expeditiously and smoothly in case of a crisis caused by a sudden outbreak of aggression. Bringing the delegates together for a special session from all parts of the world on twenty-four hours' notice need not be difficult. It can be accomplished by using members of the diplomatic missions in this country as special delegates in case the regular delegates are absent.

The earmarking of military units and reserves for international use will raise many of the difficulties encountered in raising an international force under Article 43. Bringing a balanced land, naval and air force together quickly enough to stem an aggression at or near the outset in distant parts will be a tremendous task. Even a force such as the United States had in Japan would be exceptional and not likely to be duplicated at many points in the world, unless carefully arranged beforehand. Provision will have to be made for the strategic location and movement of such forces. Obviously, transport planes of large size and great numbers would be a necessity. The difficulty of welding many military units of diverse origins and nationalities into a workable and solid whole is stupendous. This was pointed up in World War II. To be effective the organization would have to be complete from the commander-in-chief down to the lowest rank of the service. The problem of logistics and armaments is equally important and devastating in proportions.

Aside from these practical aspects there is the political angle to be considered, which involves the question of sovereignty. Could the International Military Staff direct certain forces to move to a disturbed district or to defend a specific area? Could it order that bases be established in a certain country to be manned by troops of another country? Could it replace national officers with foreign officers if need be? Would the national commander-in-chief delegate his constitutional rights in these respects to others of the international command? Will troops give due allegiance to an international organization or to a world command above that to the country of which they are nationals?

What if a threat to the peace, breach of peace or aggression is committed by one of the great Powers? The pressure of the other Powers and the use of force would no doubt mean a world war and perhaps the break-up of the organization. Is it not likely that the plan, which contemplates enforcement and dictation, will not work in case of a great Power and will work only in case of a minor Power which can be safely pressured

without opening a general war. In other words, if an unruly great Power cannot be pressured under Chapter VII, it would seem war can only be avoided by *joint compromise* among the great Powers.

The resolution is operative only if the Security Council, because of lack of unanimity of its permanent members, "fails to exercise its primary responsibility" under Chapter VII. This may become an element of delay. Considerable debate may ensue in the Council, perhaps a sort of filibuster, as occurred last August. At what point will failure occur? Will the Assembly decide this question? The Security Council can itself determine the question by refusing to act on the matter in hand or discharging itself of it or laying it before the Assembly (Articles 11, 12, 20 of the Charter). Also mere failure to act because of a veto clearly falls within the terms of the resolution. Until the Council so disposes of the question, it will be seized of it and, by the Charter, the Assembly cannot make recommendations on a matter which the Council has under consideration. Could the Council take up another phase of the subject after the Assembly has taken over? Or if the Council action is too limited or piecemeal or weak, could the Assembly proceed to handle the matter on a broader, more complete and forceful scale?

An opportunity is at hand for a practical application of the "Uniting for Peace" Resolution. General MacArthur reported early in November that late in October, when on the point of victory over the North Koreans, large and fully equipped units from the armies of Communist China had intervened on behalf of the North Koreans. They have gone into battle against the United Nations forces. Obviously, this is a fresh "act of aggression" calling for further action by the United Nations. It is the prime duty of the Security Council to handle this new situation with a view to restoring peace. The Assembly is in session and could take up the matter, but it must await proceedings in the Security Council. If the Council, after debate, issues merely a warning to Communist China (not a United Nations Member) to desist and withdraw her forces, could the Assembly, believing more decisive action is required, recommend that General MacArthur, as United Nations Commander, take military steps to defeat the intervention?⁴

⁴ Since this was written the proceedings have been briefly as follows: From Nov. 10 to 30 the Council debated two Soviet resolutions in effect condemning the United States as an aggressor, and a resolution sponsored by the United States, United Kingdom and four other countries calling for the withdrawal of the Chinese forces and giving assurance that the interests of Korea's neighbors would be respected. The Soviet resolutions were snowed under. The other resolution received a vote of 9 to 1, but was finally vetoed on Nov. 30 by the Soviet Union. Thereupon steps were taken to remove the subject of Chinese aggression to the Assembly. There the six-Power resolution in somewhat modified form was introduced, by the several Asian and Arab Powers, instead of supporting it, presented another resolution setting up a committee of three (Iran, India and Canada) to negotiate a cease-fire with the Chinese. This resolution was approved in committee on Dec. 14 by a vote of 52 against 5 of the Soviet bloc, which left the six-Power resolution in abeyance. The sum total of the Soviet votes on these resolutions indicates that Russia is not interested in resisting the progress of hostilities or working out a peaceful settlement.

It should be noted that the resolution contemplates armed action by a two-thirds majority of the Members of the General Assembly present and voting (Article 18) without regard to the great Powers, although they must as a practical matter furnish the bulk of the men and armaments involved. Thus, in case a question as to maintaining peace and security is vetoed in the Security Council, the Assembly by a two-thirds vote can proceed under the resolution to consider the matter and make recommendations, including the use of force, if need be. Consequently the principle of unanimity in the Security Council so much applauded by the five great Powers at San Francisco, has in effect been circumvented and exchanged for a two-thirds vote of the Assembly in case the Security Council fails to act. Thus the right of veto on issues of war and peace would be lost to each of the great Powers. It is conceivable that the great Powers might be in the minority or divided on the issue and that the small nations who have always chafed under the veto would hold the balance of power in voting and at last come into their own as a force for peace. On the other hand, this opens a great opportunity not only for playing politics in the Assembly, but for splitting rifts in the United Nations. Would the great Powers which opposed the action be enthusiastic about furnishing troops to support it? They have a specific obligation under Articles 25, 48 and 49 of the Charter to carry out decisions of the Security Council and also "any action it [United Nations] takes in accordance with the present Charter." (Article 2 (5)). It would seem necessary, however, that at least some of the great Powers which would bear the burden should back the proposed action, as the small Powers could not survive alone.

The legality of the "Uniting for Peace" Resolution was denied vehemently by the Soviets in the debates and has been doubted earnestly in other quarters. It is said to be an attempt to by-pass the Security Council, to usurp its constitutional powers and relegate it to a secondary position in the United Nations structure, in other words, a back-door way of amending the Charter.

It is not surprising, therefore, that the efforts of the committee to negotiate a truce were bluntly rejected by the Peiping government on Dec. 22, when it declared the only acceptable bases for negotiation were its earlier demands in the Security Council: the withdrawal of all foreign troops from Korea, the removal of the U. S. fleet from Formosan waters, and the admission of Communist China to the U.N. Nevertheless, the committee made another cease-fire proposal, which fortunately was rejected on Jan. 17 with the demand that these conditions be granted first. Thus, even while intensified hostilities by Communist China continued against U.N. forces, 2½ months have been consumed in fruitless debate and ignominious maneuvers and yet she had not once been declared an aggressor nor requested to retire her troops from Korea. A U. S. resolution of Jan. 20 to this effect was opposed by the Asian-Arab group, which proposed a seven-Power conference with the Chinese on cease-fire and other questions. Finally, the committee on Jan. 30 rejected the Asian-Arab proposal and approved the American resolution by a vote of 44 to 7. It would seem that the Assembly must at least affirm this stand under the "Uniting for Peace" resolution or stultify the Charter and the June resolutions. Anything less will be a moral, if not a dishonorable, defeat.

The Charter provides a regular method of amendment by a vote of two-thirds of the Members, followed by ratification by them, including all the permanent members of the Security Council (Article 108) or by similar action in a general conference of the Members (Article 109). The resolution, however, proposes simply to tap a reservoir of plenary powers of the Assembly set up in the Charter—powers which cannot be abridged by the veto. Thus, the Assembly may “discuss any questions or any matters within the scope of the present Charter or relating to the power and functions of any organs provided for in the present Charter, and . . . may make recommendations to the Members . . . or to the Security Council or to both on any such questions or matters” (Article 10); “discuss any questions relating to the maintenance of international peace and security . . . and . . . may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both” (Article 11). But Article 12 makes a special exception (also mentioned in Articles 10, 11, 35) that the Assembly “shall not make any recommendation with regard to that *dispute or situation*” while the Security Council is exercising its functions in regard thereto. And “The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international *peace and security* which are being dealt with by the Security Council” and also “immediately the Security Council ceases to deal with such matters” (Article 12). There is not a precise prohibition in the latter clause as in the first clause, but it is assumed that the intention was to prohibit the Assembly from acting on any of these matters *pari passu* with the Security Council. In short, the Security Council is charged by the Charter with the primary responsibility for maintaining and restoring peace among nations, and the Assembly is not to interfere in any such matter of which the Council is already seised, but otherwise the Assembly has full power to express its views on the subjects mentioned. //

On the other hand, the Security Council can discharge itself of any matter on the agenda (being a procedural action) by a majority vote. Probably in most instances this could be brought about by the group anxious to get the matter before the Assembly for consideration without the impediments of Security Council procedure. However, there appears to be a restriction here. The last clause of Article 11, paragraph 2, requires that “any such question [relating to the maintenance of international peace and security] on which *action* is necessary shall be referred to the Security Council by the General Assembly before or after discussion.” By clear inference the Assembly may discuss such questions but may not itself take enforcement action thereon. Such action appears to be reserved as an exclusive function of the Council. But presumably the Assembly may still make a recommendation for what it may be worth in its moral quality, and it might serve as a rallying point for voluntary collective action.

A question has been raised as to the recommendation of the resolution

that armed units be maintained for the use of the Security Council *or the Assembly*. The only provisions in the Charter for the raising and use of armed forces are in Articles 42-48, and 53. Under these articles forces are to be made available according to *special agreements* negotiated by Members with the Security Council and are to be subject to the call of the Security Council, which decides upon their employment with the assistance of the "Military Staff Committee."⁵ The resolution overrides these special provisions and makes the straight recommendation that each Member maintain armed forces for use of the Security Council *or General Assembly*.⁶ The Charter does not give the Assembly any authority to make provision for armed forces or to use them unless it be read into some of the general articles of the Charter.

One exception is maintained in the resolution (as it is in the Charter), namely, the "inherent right of individual or collective self-defense if an attack occurs against a member," but this prevails only until the Security Council has taken the necessary measures to maintain peace and security (Article 51). It seems clear that the resolution is not limited to self-defense action under Article 51, but contemplates troop movements upon recommendation of the Assembly—a function which the Charter grants primarily, at least, to the Security Council. //

From the point of view of the United States there is a constitutional angle which deserves consideration, particularly with reference to a declaration of war in case the United Nations contingents are called on to repel aggression. President Roosevelt once said he might never declare war but he might make war. The United States on numerous occasions has landed small contingents on foreign shores, but the alleged purpose has been to protect American lives and property. In a few other cases the United States has used naval forces to protect American commerce on the high seas without a formal declaration of war, as in the Barbary pirate depredations and in the so-called Security Zones of the United States during the last war. President Truman's action, however, in sending troops into Korea was for a quite different purpose, namely, to resist foreign aggression in a foreign land. This may be mere police action in the eyes of the United Nations, but in the view of many in the United States, calling out the Army and Navy to halt aggression abroad is war, though it be given another name. What then becomes of the constitutional requirement that Congress

⁵ Until the special agreements are negotiated, the great Powers under the Moscow Declaration of October 30, 1943, are to consult together and with other Members with a view to joint action for maintaining peace and security (Article 106). No action appears to have been taken under this article.

⁶ The initiative in providing armed forces is admitted in the preamble of the resolution to belong to the Security Council, but it is deemed desirable to have available "means for maintaining peace and security" pending conclusion of the arms agreements with the Security Council. An accompanying resolution (Resolution B) calls on the Security Council to devise measures for "placing of armed forces at the disposal of the Security Council by the States Members of the United Nations."

shall declare war? When the Charter was before the Senate this question was raised and fully debated on the floor, and the feeling was that the problem was one to be spelled out when the military agreements with the Security Council were negotiated and submitted to the Congress for approval by appropriate Act or joint resolution. It was thought the problem could be solved at that time and the prerogative of Congress to declare war could still be protected.

The resolution reserves the "constitutional processes" of Member States in this regard. But no military agreements have been negotiated with the Security Council, nor has the "process" been settled by Congress. Meanwhile, our representative in the Assembly may, under the new resolution, cast a vote for the use of United States forces anywhere in the world without any consideration or approval by Congress of the action taken. This might amount to making war without declaring war, as is now the case in Korea. It is submitted that in the absence of such military agreements there is no legal obligation to send American forces to Korea or anywhere else.⁷

There remains only to consider the attitude of the Soviet Union and its satellites. They have consistently opposed this resolution and other resolutions looking to peaceful settlement, preparing machinery to strengthen peace and security, and to combat breaches of peace and active aggression (including the Korean resolutions)—all of which are essential objectives of the Charter.

About a year ago (December 1, 1949) the Soviet *bloc* voted against the resolution of the General Assembly on the "Essentials of Peace," calling on Member nations to refrain from "threatening or using force contrary to the Charter" and to coöperate in other stated ways. On June 30 last the Soviet Union, in reply to the request of the United States, refused to use its influence with the North Korean authorities to withdraw their invading forces. On October 12 Stalin telegraphed the North Korean premier assuring the aggressors of his moral support and hoping they would be successful. And now comes the charge of deliberate and premeditated aggression by the United States as stated by the Soviet Union in the Security Council.

What can these acts all mean except an open and shameless revolt of these five Members against the principles and the obligations which they undertook to carry out when they signed the Charter? It amounts to giving aid and comfort to the North Koreans in opposition to the action of the United Nations—a warlike defiance of the world. Their attitude is aimed to ob-

⁷ On June 30, 1950, President Truman told the American people: "We are not at war; the action we have taken is police action." On Dec. 15 he said: "There is actual warfare in the Far East. . . ." On Jan. 4, 1951, he indicated that the nation is not formally at war, but is carrying out an obligation assumed when it signed the Charter. But Congress in the implementing Act (Sec. 6) carefully limited its authorization to the future military agreements with the Security Council.

struct the effort to gain effective collective security in any form and especially through the Security Council. The instances are too frequent, too systematic to admit of any other conclusion, tragic though it is. As the Philippine Foreign Secretary is quoted as saying: "It is difficult to escape the feeling that the opposition to this resolution is inspired by the desire to conceal aggressive aims, to nourish them in secret, and to pursue them by stealth." And this, though in the Charter they agreed to suppress aggression and to refrain from assistance to the aggressor. Mr. Churchill once said in regard to the Charter, "the aggressor who breaks this contract will stand naked in infamy before the embattled conscience of an outraged world."

It is said that the resolution in question has rejuvenated and invigorated the spiritual decline of the United Nations. Nevertheless it would seem that the United Nations is in jeopardy so long as the world is divided into two warring camps, carrying on virulent propaganda, "cold wars," armament races, threatening maneuvers, armed forays or attacks. These only lead to stop-gap measures such as power *blocs*, regional arrangements of collective self-defense and the use of armed force to quell aggression under Chapter VII. That is anything but peace among nations. The only harvest is ill-will and conflict. It is submitted that real peace can only come about when the nations are willing to settle disputes by the use of the peaceful resources open to them in the pacific routines of Chapter VI. No greater reservoirs of peace have been conceived by man. But the mutual will to drain them is lacking.

L. H. WOOLSEY

LEGALITY OF THE SECURITY COUNCIL RESOLUTIONS
OF JUNE 25 AND 27, 1950

The Korean War is the first experiment in international enforcement action by military measures undertaken by the United Nations in the case of a breach of the peace. At the time of writing,¹ the ultimate outcome of this experiment is not yet clear, especially in the light of armed intervention by Communist China at a moment when the Korean War, as such, seemed to have been won. The Korean War has taught us, even up to now, many lessons in the military and political field. It has shown that an international enforcement action is, for all practical purposes, a war and that the most important thing, as in any war, is to win it. It has shown the continuing great importance of the long and unduly neglected laws of war.

The Korean War may give rise to many political problems. It may revive the old debate between the adherents and opponents of international armed enforcement action. It may revive the argument that any such action is in danger of leading to general war. It may bring up the question of whether the United States, as the principal military arm of the United Nations, should and can, at bitter expense in casualties and treasure, take such enforcement action in any corner of the world, whereas this country's

¹ November 15, 1950.

great antagonist always acts by proxy and keeps its own army untouched. On the other hand, it may well be argued that to have done nothing in the case of a flagrant armed attack would have meant the end of the United Nations, just as to have done nothing in the case of Japan's invasion of Manchuria in 1931 was the beginning of the end of the League of Nations. For the United Nations Charter lays down as the very first and most important purpose of the organization, "To maintain international peace and security, and to that end: to take effective collective measures . . . for the suppression of . . . breaches of the peace. . . ."²

The Security Council did take action by its resolutions of June 25 and 27, 1950. These resolutions have been branded as illegal, not binding, and as being in violation of the Charter, by the Soviet Union, Communist China, Poland and Czechoslovakia, and their legality has also been questioned here.³ Contrary to political problems raised by the Korean War, the problem of the validity of the two Security Council resolutions is a strictly legal problem, which, in the light of these attacks, has to be re-examined. The following investigation is exclusively restricted to the problem of the legality of the two resolutions in question.

To declare these resolutions as legal or illegal is to give a value judgment by taking the corresponding legal norms of the Charter as a standard of valuation for the actual conduct of the Security Council. In doing so, it is necessary to interpret these norms. It is true, as Kelsen⁴ points out, that any legal document, however carefully drafted, will in most instances allow more than one interpretation which all are legally and logically possible. This is a necessary consequence of the imperfection of any language. It stands to reason that this will be all the more so in the case of the United Nations Charter, which, from the point of view of legal technique, is badly drafted. It is also true that the Charter follows a political approach rather than a legal one. But as long as the organs of the United Nations choose, even from political motives, one of the interpretations which are legally and logically possible, they are perfectly within their rights. True, the United Nations Charter, like the Covenant of the League of Nations, authorizes no organ to give an authentic interpretation. But the practice of the organs has to be taken into consideration. A judgment whether the two resolutions in question were legal, means, therefore, to evaluate them against the corresponding norms of the Charter and the practice of the Security Council, established and consented to by the Members.

That the United States took the initiative in this case is clearly her right as a Member. That the United States bore the brunt in the military enforcement action of the United Nations is equally legal. As Great Britain's

² U.N. Charter, Art. 1, par. 1.

³ See F. B. Schick, "Viceant consules," in *The Western Political Quarterly*, Vol. III, No. 3 (September, 1950), pp. 311-325.

⁴ H. Kelsen, *The Law of the United Nations* (London, 1950), pp. xiii ff.

unwillingness in 1931 has shown, no international enforcement action is possible in a concrete case, whatever the corresponding rules may be, if there is not a great Power able and willing to take the initiative.

1. Whether the Security Council's "primary" responsibility for the maintenance of international peace and security, is an exclusive one, to the exclusion of the other organs, need not be investigated here, as the resolutions in question have been taken by the Security Council.

2. In accordance with Article 39 of the United Nations Charter, the Security Council must, before taking enforcement measures, first determine the existence of any breach of the peace. This the resolution of June 25, 1950,⁵ has done. It has determined, first of all, that the armed attack upon the Republic of Korea by forces from North Korea constitutes a breach of the peace. That the armed attack came from North Korea cannot be doubted in the light of the reports by the United Nations Commission on Korea. Nothing in the facts upholds the affirmation in the Soviet statement to the American Ambassador in Moscow of June 29, 1950,⁶ that "the events taking place in Korea were provoked by an attack of forces of the South Korean authorities on border regions of North Korea," an affirmation also contained in the Polish note to the Secretary General of June 30, 1950.⁷

3. That the armed attack was directed against South Korea, which is not a Member of the United Nations is legally irrelevant. Contrary to the wording of Article 51 ("armed attack . . . against a Member of the United Nations"), Article 39 speaks of "any" breach of the peace.

4. That North Korea is not a Member of the United Nations is, under Article 39 and Article 2, paragraph 6, equally legally irrelevant.

5. The argument of the above-quoted Polish note that "the Government of the People's Democratic Republic of Korea was constituted which represents the entire Korean people and which is recognized by several countries, including the Republic of Poland," is legally untenable. The condition laid down by general international law for the coming into existence of a *de facto* government is the principle of effectivity. The government of North Korea has never exercised effective control over South Korea. It is equally settled that recognition cannot supply the lack of effectivity prescribed as a condition by general international law.

6. Whether North Korea is to be regarded as a state or not legally makes no difference, for the Security Council "may very well decide that a situation which has not the character of a conflict between states is a threat to international peace and take enforcement action against . . . a group of people involved in this situation."⁸

⁵ U.N. Doc. S/1501.

⁶ United States Policy in the Korean Crisis (Department of State Pub. 3922, Far Eastern Series 34, July 1950, Doc. 95), p. 64.

⁷ U.N. Doc. S/1545.

⁸ Kelsen, *op. cit.*, p. 731.

7. The argument that the events in Korea constituted only civil war and that, therefore, no intervention by the United Nations is permissible according to Article 2, paragraph 7, is, of course, legally untenable. For even a civil war, if it was one, may constitute a breach of the peace, and Article 2, paragraph 7, excepts from this prohibition the application of enforcement measures under Chapter VII.

8. The argument of the above-quoted Polish note that there were disputes between North and South Korea and that "the Korean people desires to achieve the unification of the whole Korean nation within one State," is not to the point. Apart from the fact that such unification, also strongly wanted by the United Nations, was made impossible only by the attitude of the Soviet Union, the settlement of disputes as such and the measures of enforcement for breach of the peace must be clearly distinguished. It is the difference between Chapters VI and VII. It is, within the Organization of American States, the difference between the Rio Treaty of 1947 and the Pact of Bogotá of 1948.⁹ That is why Article 40 of the United Nations Charter states that "provisional measures shall be without prejudice to the rights, claims or position of the parties concerned."

9. The resolution of June 25 is, as to content, perfectly legal. Having determined a breach of the peace, the resolution takes provisional measures, in accordance with Article 40 of the Charter, by calling for the immediate cessation of hostilities. Such "call" is a decision and, therefore, binding. Article 40 further provides that "the Security Council shall duly take account of failure to comply with such provisional measures," and this the resolution of June 27, 1950,¹⁰ has done.

10. Particularly sharp attacks against the legality of the two resolutions have been made from the procedural point of view. It must be admitted, and is generally agreed, that the Security Council could legally adopt these resolutions only because of the absence from those meetings of the Soviet representative, who otherwise would in all probability have vetoed them. But the problem is whether those resolutions, taken in this absence, are legal. The first problem is that of the quorum. It is correct that where, as in the Charter, there is no particular rule concerning the quorum, all members must be present in order to enable the organ to transact business. "However, in the practice of the Security Council, absence of a member, even of a permanent member, does not prevent this body from adopting a resolution."¹¹

11. One of the principal arguments against the legality of the two resolutions, an argument made by the Soviet Union, Poland, and by the note of Czechoslovakia to the Secretary General of June 29, 1950,¹² is the representation of China in the Security Council by Dr. Tsiang. This argument is used in three forms: that Dr. Tsiang, being "merely the representative

⁹ See Pact of Bogotá, Art. VIII.

¹¹ Kelsen, *op. cit.*, pp. 244-245.

¹⁰ U.N. Doc. S/1511.

¹² U.N. Doc. S/1523.

of the Kuomintang group," has no authority to represent China, and that, therefore, the resolutions are illegal; that, for this reason, China as a permanent member of the Security Council, was not represented, so that there were two permanent members absent; finally, that the second resolution was not carried with seven votes to one (Yugoslavia), two abstentions (India, Egypt) and one absent (Soviet Union), but only with six votes; it was therefore, it is said, not a resolution, but only the personal and not binding expression of the opinion of six members of the Security Council. Now it must be admitted that the representation of China by the representative of a government which is reduced to Formosa is certainly paradoxical. But this is a consequence of the fact that recognition of an effective general *de facto* government is no legal duty. It is not more paradoxical than the recognition by the Executive, and hence, by the courts of this country, of the representative of the Kerenski government as the sole representative of Russia, years after that government had completely disappeared. It is further to be noted that only the Security Council decides on the seating or unseating of the representative of a member, and that no vote has been possible, up to now, to unseat the present representative of China. The whole problem is now under study in the 1950 session of the General Assembly. But in any case this argument of the Soviet Union must, in contemplation of law, be considered as waived by Mr. Malik's return to the Security Council. Did he preside over an "illegal" Council? Why did the Soviet delegate veto the re-election of the Secretary General, if anything which the Council would do is illegal anyway?

12. A further argument, strongly maintained by the Soviet Union, Poland and Czechoslovakia, is that the resolutions were illegal and invalid because of the absence of the Soviet Union. The United States¹³ has argued legally that Article 28 of the Charter prescribes that "The Security Council shall be so organized as to be able to function continuously" and that, therefore, this "injunction is defeated if the absence of a representative of a permanent member is construed to have the effect of preventing all substantive action by the Council." But it could be argued from Article 28 that the members of the Security Council have a legal duty to be present at the meetings of the Council, that the absence constitutes a violation of Article 28. For, although, as Kelsen points out, the second sentence of Article 28, paragraph 1, that "Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization," is most unfortunately worded, yet it contains the words: "for this purpose," namely, to enable the Security Council to function continuously.

13. Finally, it is said that the absence of the Soviet Union prevented any legal resolution by the Security Council, as resolutions on non-procedural matters—and the resolutions in question were certainly of this character—must be adopted, in accordance with Article 27, paragraph 3, "by an af-

¹³ Statement by the Department of State, June 30, 1950, *op. cit.*, note 6, pp. 61-63.

firmative vote of seven members including the concurring votes of the permanent members." This paragraph certainly can be interpreted in the sense that the concurring votes of *all* the permanent members are necessary; but, as Kelsen shows,¹⁴ there is also a second interpretation legally possible, by *argumentum a contrario* from Articles 108, 109, where it is specifically prescribed that the two-thirds majority of the members must include "*all*" the permanent members of the Security Council. Under this second interpretation, Article 27, paragraph 3, would mean "including the votes of the permanent members, present and voting."

14. Indeed, it is this second interpretation which prevails in the practice of the Security Council. This is already shown in the accepted practice that abstention by a permanent member is not a veto. The Statement of the Department of State of June 30, 1950,¹⁵ lists the principal cases of abstention by a permanent member and then continues: "The voluntary absence of a permanent member from the Security Council is clearly analogous to abstention." This is legally not tenable; for a precedent on abstention is only a precedent on abstention, not on absence. But there is a precedent on absence, when Mr. Gromyko walked for the first time out of the Council meeting. The Security Council, at its 30th meeting, in the Iranian case adopted a resolution by nine votes in the absence of the delegate of the Soviet Union. And Mr. Gromyko did not attack the legality of this decision after his return.

The investigation of this problem leads, therefore, to the conclusion that the resolutions taken by the Security Council on June 25 and 27, 1950, were legal and valid, weighed, from a strictly legal point of view, in the light of the corresponding rules of the United Nations Charter and of the practice of the Security Council.

JOSEF L. KUNZ

PREVENTIVE WAR CRITICALLY CONSIDERED

Members of the American Society of International Law are by inference charged by the Constitution of their Society with doing all that is possible to promote the study and development of international law and the conduct of international affairs on the basis of law and justice. For this purpose it is not sufficient to study and advocate the development of the law itself or for its own sake. Much attention must be given, certainly much more than has been given in the past, to the second section of the mandate, partly because of its own importance and partly to provide the kind of international situation where the law can thrive and be effective—which in turn is calculated to promote peace and justice. Friends of international law cannot afford to evade even the most difficult and delicate issues in the field of international relations on the ground that they are purely political in character.

¹⁴ Kelsen, *op. cit.*, pp. 239-241.

note 13.

One of these dangerous issues being widely discussed today is that of "preventive war.") Quite frankly a certain number of persons, by no means all of them insane, suggest that the United States should anticipate what they believe to be certain aggression by Soviet Russia against this country, if, indeed, as they would argue, such aggression may not fairly be regarded as already having begun. Just what all the modalities of such action shall be is not specified, but perhaps the general issue may be considered without such precise definition and it might also be just as well to consider the problem in its own right apart from its application in Russian-American relations.

Preventive war as an idea or doctrine has a bad name. It is by no means a new idea and for over one hundred and fifty years it has rather uniformly been condemned. This is traceable, apart from the merits of the case, to the fact that the opposition came very largely—and strongly—from the pacifist segment of opinion or from ardent lovers of peace. Other groups or individuals—governments, officials, realistic students of international relations—who might (not necessarily, value or validity in the idea, would be less inclined to defense. Indeed it is probably not going too far to say that preventive military action has been condemned completely to permit a careful consideration of the rather uncritically condemned and a critical reexamination may not be out of place in a day when obviously new elements for security action are in view.

(One of the most striking and impressive reasons lies in the fact that in other fields of politics, local, and in other walks of life than the purely military—for example—extensive use is made of the preventive action is in many situations given strong remedial action.) The subject is verbal. Preventive medi-

several prerequisite conditions can be detected by common observation and have indeed at times been formulated by those concerned with such action. The injury feared must be highly probable, if not certain, in absence of preventive action; (the probable damage to be done by any preventive action must be markedly less than the anticipated injury); (the action must be taken on the basis of public law, which is supposed to have involved in its establishment the agreement of those against whom the action is taken); and finally, adequate provision must be made to control the preventive action actually taken, to prevent it from becoming excessive, and to permit possible judicial or at least adequate administrative review afterward. (Finally such action is rarely permitted to interested individuals, but is reserved for public authorities, "self-help" having been eliminated here even more completely than in the field of remedial justice).

Obviously, few of these prerequisite conditions exist in the international field; or, rather, while the situation justifying preventive action in the local field may quite conceivably be reproduced on the international level, all of the other apparatus of preventive public action is lacking or is very defective. We do not yet have statutes authorizing such action; we do not

have international agents or forces capable of taking such action; we do

not have means for control and review. Until the first military action by a state or group of states on would seem to enjoy no juridical foundation. Preventive war by the United States against Japan may appear to constitute merely a contest, but it is important precisely because of its limited other side of the picture, which is probably the purely legal aspect.

It does not preclude action by a state against another sense of the term already has been begun, especially in a highly competitive international action for preservation of peace and

international law and as a matter of international administration, we would do well to reconsider the oversimplified attitudes taken toward preventive war in the past, *pro* and *con*, respectively, by some patriots and all pacifists. The device of preventive international police action, non-military or military, is or would be terribly delicate and dangerous, especially if delegated to any particular state or states to carry out—and a unitary international force seems still far in the future. Nothing is to be gained by refusing to keep ahead of events in thinking out the problem, however.

PITMAN B. POTTER

RESERVATIONS TO MULTILATERAL TREATIES

The problem of reservations to multilateral treaties signed at the close of international conferences is one that has long been a matter of concern to the regional Organization of the American States, as it is now to the Secretariat of the United Nations. How can we promote the general acceptance of international agreements and yet recognize that, after the text of the treaty has been agreed upon and signed by representatives of the executive department of a state, the popularly elected Congress, which in democratic constitutions must give its assent to the ratification of the treaty, may object to certain provisions of the treaty and refuse to approve the agreement without making exception of one or more objectionable articles?

The simplest answer would be to say that we simply cannot recognize any such intervention on the part of the legislative body. Once the treaty has been signed, the treaty must be ratified in the form signed or not ratified at all. But such a position would be needlessly extreme. What if the other signatories of the treaty find no objection to the proposed reservation, looking upon it as being no more than the expression of a national complex which the particular state may have with respect to possible effects of the treaty not contemplated by themselves, or in any case as not constituting any substantial obstacle to the attainment of the objectives of the treaty? In such a case the other signatories might readily agree to accept the proposed reservation under the belief that it is better to have the particular state coöperate in that restricted way than not at all; and if they are willing to do so, why not let them?

The difficulty arises when, out of a large number of signatories, some of which may already have ratified the treaty, one or two, perhaps even as many as ten percent, may be unwilling to accept the proposed reservation. In such cases there is a choice of two distinct procedures: either to exclude the state proposing the reservation from participation in the treaty, or to permit it to participate with the large majority who are willing to accept its reservation, leaving the treaty without effect in relation to the states unwilling to accept the reservation. The first of these two procedures was

followed by the Secretariat of the League of Nations and is now followed by the Secretariat of the United Nations. The second procedure is followed by the Pan American Union in depositing the ratifications of inter-American regional treaties. Which of the two is the preferable procedure, or, better, which of the two is the procedure best suited to the particular conditions under which it is being applied?

In a recent report of the Secretary General to the General Assembly of the United Nations¹ attention is called to the lack of unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent of other governments when a state proposes to accede to a treaty with a reservation, or as to the legal effect of the objection made by a particular state to a proposed reservation, current importance being given to the question in connection with the Convention on the Prevention and Punishment of the Crime of Genocide.² The report surveys the practice of the Secretariat of the United Nations, presents the views of international jurists and of governments, and argues in favor of the requirement of unanimous consent to reservations. A significant feature of the procedure of the United Nations is that it does not go so far as to require that all of the signatory states agree to accept the proposed reservations, but only those which, as the report describes them, "have established their immediate concern" in the treaty by having themselves ratified it. Signatory states which had not as yet ratified the treaty would be informed of the proposed reservation, and any objections which they might make to it could be taken into account, both by the reserving state and by the other parties, without, however, being in themselves sufficient to defeat ratification.

The procedure followed by the Pan American Union, now acting as the General Secretariat of the Organization of American States, was fixed in 1932 by decision of the Governing Board of the Union acting in pursuance of the functions of depositary of diplomatic documents conferred upon it by the Habana Conference of 1928. A treaty ratified with reservations was held to be in force between the reserving state and the states which accepted the reservations; and on the other hand it was held not to be in force between a state ratifying with reservations and another state which had already ratified and which did not accept the reservations. The Eighth International Conference of American States held at Lima in 1938, seeking to discourage the introduction of reservations, adopted a resolution (XXIX) which made provision that if a state proposed to adhere to or ratify a treaty with a reservation, it should first transmit the text of the reservation to the Pan American Union so that the Pan American Union might inform the signatory states and ascertain whether they accept it or

¹ U.N. Doc. A/1372, September 20, 1950.

² See Supplement to this JOURNAL, p. 13; also Notes on Legal Questions Concerning the United Nations, this JOURNAL, Vol. 44 (1950), p. 127.

not. According to this procedure the ratifying state still has the right to proceed to ratify with the reservation in spite of the fact that the effect will be to bring the treaty into effect as to the states accepting the reservation and leave it inoperative as to other states. The resolution suggests, however, that it was the hope of the Conference that if the observations of a number of signatory states should indicate that they were not willing to accept the reservation, in such event the state which proposed to ratify with the reservation would reconsider its decision, and before proceeding to deposit its ratification of the treaty would try to modify it so as to make it generally acceptable, or possibly eliminate it altogether.

It is of interest to note that the report of the Secretary General of the United Nations concedes certain advantages to the procedure of the Pan American Union, noting that it is "well adapted to the needs of a regional agency and to the close relations existing between States within a defined geographic area." On the other hand, it is argued that the theory is not well fitted to the purposes of multilateral conventions drawn up under the auspices of the United Nations which have a world-wide character and to which states "in very diverse circumstances" agree to be bound. This would appear to be particularly true in the case of treaties having a legislative or constitutional character, such as the Genocide Convention, as distinguished from contractual conventions which, although multilateral in form, are in operation simply a complex of bilateral agreements.

As against the position taken by the Secretary General of the United Nations, the Uruguayan Delegation argued before the Sixth Committee that it was inexpedient to give to any single state the power to exclude any other state from the operation of a treaty by reason of disagreement with "the most trivial and inoffensive reservation," a rule which, it was said, would be "equivalent to extending the veto into the sphere of the General Assembly." The United States Delegation proposed that the problem be referred to the International Law Commission, and that in the meantime the system proposed by the Secretary General be applied; while the United Kingdom, in an annex to the report of the Secretary General, took the position that reservations should be accepted only with the consent of all of the signatory states. Among the other resolutions submitted to the Committee, one coming from the French representative held that the question should be referred to the International Court of Justice for an advisory opinion.

The conclusion reached by the Sixth Committee and submitted to the General Assembly in the form of a resolution calls for a request from that body to the International Court of Justice for an advisory opinion, limited, however, to the Genocide Convention. Three separate points are raised:

1. Can the reserving state be regarded as being a party to the Convention while still maintaining its reservation if the reservation is ob-

jected to by one or more of the parties to the Convention but not by others?

2. If the answer to the first question is in the affirmative, what is the effect of the reservation as between the reserving state and:

- (a) the parties who object to the reservation,
- (b) those who accept it?

3. What would be the legal effect as regards the answer to question (1) if an objection to a reservation is made:

- (a) by a signatory which has not yet ratified,
- (b) a state entitled to sign or accede but which has not yet done so?

The resolution also proposed that the International Law Commission be invited in the course of its work on the codification of the law of treaties "to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law." Priority is to be given to the study and a report is to be presented which can be considered by the General Assembly at its sixth session.

In the meantime the rules at present followed by the Pan American Union are to be reconsidered in order to meet the new conditions which have come about since the adoption of the resolution of the Lima Conference.

C. G. FENWICK

THE SECOND SESSION OF THE INTERNATIONAL LAW COMMISSION

The International Law Commission held its second session in Geneva from June 5 to July 29, 1950.¹ Two members were absent and the Soviet member, Professor Koretsky, withdrew when the Commission refused to exclude the member who was a national of China. The Chairman ruled, and was upheld by the Commission, that Mr. Koretsky's proposal was out of order since the members of the Commission serve in a personal capacity and not as representatives of governments. Professor Georges Scelle was elected Chairman.

On the agenda were several topics, the treatment of which can only be briefly noted here. The General Assembly had asked the International Law Commission to formulate the principles of international law recognized in the Charter and in the judgment of the Nürnberg Tribunal. The Commission took the view that its task was not to express any appreciation of the Nürnberg principles as principles of international law, but merely to formulate them in accordance with instructions. Seven principles were stated and were referred back to the General Assembly.

¹ For report of the Commission on its second session, see this JOURNAL, Supp., Vol. 44 (1950), p. 105.

Reports were made upon the subject of International Criminal Jurisdiction by Mr. Sandström, who thought that an international judicial organ for this purpose was not desirable, and by Mr. Alfaro, who regarded it as possible and desirable. The Commission voted 8-1 with two abstentions that such a court was desirable, and 7-3 with one abstention that it is possible. It was decided not to recommend a Criminal Chamber of the International Court of Justice.

In the preparation of a Draft Code of Offenses Against the Peace and Security of Mankind, which had been requested by the General Assembly, the Commission thought that the term should be limited to offenses which contain a political element and disturb peace and security, omitting such offenses as piracy or counterfeiting; it limited the subject also to the criminal responsibility of individuals. Until an international court should be established, implementation would have to be achieved through the action of states. The provisional draft was referred to the Rapporteur (Spiropoulos) for report to the next session.

It will be recalled that the Commission itself had decided to work first upon three subjects of international law: the Law of Treaties (Brierly, Rapporteur); Arbitral Procedure (Scelle); Régime of the High Seas (François). On the first topic, the Commission limited itself to general discussion of a few problems.

Professor Scelle in his report on Arbitral Procedure concentrated his effort toward making a code which would close the loopholes through which states have been able to evade obligations to arbitrate. In general, he sought an international body which should have authority to interpret compromissory clauses, assure the presence of arbitrators, take provisional measures, etc. Following a careful discussion, the draft was returned to the rapporteur (Why are they called "*special rapporteurs*?") for revision and report to the next session.

Discussion of the Régime of the High Seas was confined mostly to the topics which should be included in a code. The Commission decided that it could not codify all of maritime law and agreed upon some topics to be studied and reported at the next session by Mr. François. Of current interest are the views of the Commission with regard to the "Continental Shelf" doctrine. It held that the sea-bed and sub-soil were subject to the jurisdiction of littoral states, but that the waters above remain under international law. The views expressed were not dependent upon the presence of a "continental shelf" but were based rather upon proximity.

Finally, a detailed and useful report was presented by Mr. Hudson upon "Ways and Means for Making the Evidence of Customary International Law Readily Available." The Commission recommended that the Secretariat publish a number of series and collections of materials and that governments should publish digests of, and materials relating to, international law from their own practice.

It cannot be said that this was a very fruitful session. A useful recommendation was reached regarding the means of making more readily available the evidence of customary international law, and the two tasks set for the Commission by the General Assembly were completed, though they leave the impression that the Commission had its tongue in its cheek in doing so. It would not be fair to criticize the fact that none of the three topics of international law were completed, since the Commission had to spend some of its time on other tasks and in any case should take ample time for such studies. It does, however, seem that criticism could be made of the reports submitted. There had been no preliminary discussion by the Commission as to how the topics should be handled; each rapporteur was left to his own devices. As a result, each report was individualistic in approach, covering what the rapporteur was interested in; none of the reports was a planned basis for discussion of the whole subject.

It is still a puzzling problem how the Commission can be best organized and staffed to accomplish its purposes. Its financial needs were again debated in the 5th Assembly, and the *per diem* of members was increased. A number of members are at the same time delegates of governments having other duties and sometimes being unable to attend meetings of the Commission. One may also suggest that the Commission has shown little interest in the current needs of international law; the only such topics were those imposed upon it by resolutions of the General Assembly. This, however, raises the question whether new law should be developed—*e.g.*, a law of aviation—by the International Civil Aviation Organization or by the International Law Commission.

The International Law Association at its meeting in Copenhagen in August, 1950, adopted a resolution submitted by the American Branch which makes the following recommendations:

1. That the General Assembly, at the next election of members of the International Law Commission, should select independent experts in preference to persons whose time is limited by their duties as representatives of their governments at the United Nations.
2. That the staff work for the Commission be done in the Division for the Development and Codification of International Law of the Secretariat, for which additional staff should be authorized by the General Assembly.
3. That in the selection of topics to be considered by the International Law Commission, whether as "development" or as "codification," more attention than has been given to them should be paid to new topics concerning which customary law has not yet been adequately developed.
4. That, where there is sufficient precedent or usage, topics should be considered by the Commission under the procedure for "codification" rather than under the procedure for "development"; and that texts considered as "codification" should not usually be submitted for adoption by the General Assembly or by states.

5. That the International Law Commission should study the methods by which it could be put into effect that a state would be obligated by a legislative treaty approved and submitted by the General Assembly unless it formally rejected the convention within a stated period of time.

CLYDE EAGLETON

COLD WAR PROPAGANDA

Coincident with the outbreak of the "cold war" the Soviet Union began a series of propagandistic attacks on the United States, its leaders and its policies, using every medium of communication for this purpose, but with special emphasis on radio propaganda. For some time the United States Government suffered these attacks to go unanswered, but in February, 1947, the "Voice of America" began to include among its other foreign programs regular broadcasts in Russian to the Soviet Union.¹ At first these programs were confined almost entirely to music and straight news reports, but gradually more and more time was devoted to answering Soviet attacks considered hostile to the United States or harmful to its national interests.²

In retaliation Moscow, on April 24, 1949, embarked on a vast effort to jam the American programs, and is at present devoting over 1000 broadcasting stations to this single purpose.³ The American Government protested through diplomatic channels and to the International Telecommunications Union against this jamming campaign.⁴ Furthermore, jamming was condemned by the United Nations Sub-Commission on Freedom of Information and of the Press at its Montevideo meeting in May, 1950, as a violation of accepted principles of freedom of information.⁵ Also, the Economic and Social Council, at its eleventh session, held in Geneva during the summer of 1950, adopted a resolution recommending to the General Assembly that it call on all Members to refrain from jamming.⁶

It is submitted that the American Government was fully justified, morally and legally, in thus embarking upon a campaign of radio broadcasts destined for the Soviet Union. The only thing to deplore with re-

¹ New York Times, Feb. 2 and 16, 1947. Discussed in *Radio, Television and Society*, by Chas. A. Siepmann (New York, 1950, 302 pp.).

² Lucas, "Piercing the Iron Curtain," *Yale Review*, Vol. 39 (Summer, 1950), pp. 603 ff.

³ *Ibid.*; New York Herald Tribune, Nov. 18, 1950.

⁴ Department of State Bulletin, Vol. XX, No. 515 (May 15, 1949), p. 638.

⁵ *Ibid.*, Vol. XXII, No. 571 (June 12, 1950), p. 954.

⁶ U.N. Doc. E/1827, pp. 1-2. Acting on this recommendation, the General Assembly adopted on December 14, 1950, a resolution condemning "measures of this nature (jamming) as a denial of the right of all persons to be fully informed concerning news, opinions and ideas regardless of frontiers." Furthermore, it invited all Member Governments to refrain from such interference and called on them "to refrain from radio broadcasts that would mean unfair attacks or slanders against other peoples anywhere and in so doing conform strictly to an ethical conduct in the interest of world peace, by reporting facts truly and objectively." U.N. Doc. A/1746, Dec. 18, 1950; United Nations Bulletin, Vol. X (Jan. 1, 1951), pp. 14, 79.

spect to this campaign is that it was launched so late, and that it is still too little.⁷

If one examines the content of the programs which Moscow has been beaming to this and other countries, its virulent character speaks for itself, and in fact was accurately characterized by Mrs. Edith S. Sampson, speaking on November 17, 1950, before the Social Committee of the United Nations General Assembly, as a "calculated campaign of hate for the outside world."⁸ But of more direct interest to the international lawyer is the fact that these radio attacks frankly issuing from the Soviet Government are, in nature and obvious purpose, a violation of the law of nations. "A state is bound under international law to refrain from spreading propaganda in a friendly foreign country hostile to the latter's government."⁹ Furthermore, "customary international law requires states in time of peace to prevent official utterances within their territory which would tend to produce civil violence in a friendly state."¹⁰ The Soviet propaganda frequently violates both these rules. And with respect to radio specifically, Professor Hyde has stated that:

The failure of a State to employ the means at its disposal to prevent uses of radio stations within its territory, or elsewhere within places under its control, from causing injury to a foreign state by radio communications taking effect within the territory of the latter, may be fairly deemed to mark the failure also to perform an international obligation.¹¹

In carrying on this campaign of radio propaganda, not only has Soviet Russia violated a general duty under international law owed the United States, but it has acted in contravention of a specific treaty obligation. This duty, rarely referred to today, is found in the Roosevelt-Litvinov accord of 1933. It is believed that on numerous occasions the Soviet attacks on the United States and its policies, including subversive and revolutionary propaganda disseminated both by radio and in other ways, have run

⁷ It was only after the outbreak of hostilities in Korea that Congress decided to increase the appropriation for the information activities of the Department of State to \$110,000,000 a year, tripling the sum thus far available for this purpose. Under the new program thus made possible, the Voice of America is to broadcast 57 hours daily instead of 30 hours, the present output, but despite this increase Soviet Russia's transmitters will be sending out 540 hours of broadcasting each week as against our 400 hours. *New York Times*, Sept. 3, 1950. See also Edward W. Barrett, Assistant Secretary for Public Affairs, "Expanding Techniques for a Truth Strategy," *Department of State Bulletin*, Vol. XXIII, No. 597 (Dec. 11, 1950), pp. 945, 947.

⁸ *New York Times*, Nov. 18, 1950.

⁹ Van Dyke, "The Responsibility of States for International Propaganda," this *JOURNAL*, Vol. 34 (1940), p. 73. See also Lawrence Preuss, "International Propaganda against Foreign States," this *JOURNAL*, Vol. 28 (1934), pp. 649 ff.

¹⁰ Quincy Wright, "Freedom and Responsibility in Respect to Trans-National Communication," *Proceedings of the American Society of International Law*, 1950, p. 104.

¹¹ Hyde, *International Law* (2nd rev. ed., Boston, 1945), Vol. I, p. 606.

counter to the following promise which, on behalf of Soviet Russia, constitutes a part of the exchange of notes between the two governments in November, 1933:

2. To refrain, and to restrain all persons in government service and all organizations of the government or under its direct or indirect control . . . from any act overt or covert liable in any way whatsoever to injure the tranquillity, prosperity, order, or security of the whole or any part of the United States, its territories or possessions, and, in particular, from any act tending to incite or encourage armed intervention, or any agitation or propaganda having as an aim, the violation of the territorial integrity of the United States, its territories or possessions, or the bringing about by force of a change in the political or social order of the whole or any part of the United States, its territories or possessions.¹²

It was only natural that the United States, face-to-face with a campaign of hostile propaganda of such a virulent character, endangering its legitimate interests both at home and abroad, should resort to measures of self-defense. The means adopted—radio programs carried by the Voice of America—would appear to be entirely reasonable and proper in the circumstances. From the more general point of view, the action of the American Government is solidly grounded on considerations of self-defense as fundamental as those invoked by Marshall in the early case of *Church v. Hubbard*.¹³ More specifically, even if the Voice of America had contained material of a nature to engage in principle the international responsibility of the United States vis-à-vis the Soviet Union, its action could still be defended as a justifiable reprisal in response to illegal acts committed by the latter.¹⁴ Since it is believed that an examination of the content of the American radio programs will reveal no evidence of illegal acts committed by the United States against the Soviet Union, the action of the American Government falls more properly within the category of retorsion, but of a special nature, namely, a type of retaliation through legal measures referred to by Professor Hyde as “the answer given to internationally illegal conduct.”¹⁵

JOHN B. WHITTON

WILLINGNESS TO BEAR ARMS AS A REQUIREMENT OF NATURALIZATION

A landmark of the law of naturalization in the United States, established by the Supreme Court after a tortuous course of decision, has now found legislative confirmation in a provision in the Internal Security Act of 1950.

The oath of petitioners for naturalization provided for in §4 (3) of the Act of 1906 required a declaration of willingness “to support the Constitu-

¹² Department of State, Eastern European Series, No. 1 (Washington, 1933); this JOURNAL, Supp., Vol. 28 (1934), p. 3.

¹³ 2 Cranch 187 (1804).

¹⁴ Oppenheim, International Law (6th ed. (Lauterpacht), London, 1944), Vol. II, sec. 33.

¹⁵ Hyde, *op. cit.*, Vol. II, sec. 588.

tion and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same"; and the Act provided that the naturalization court must be satisfied that during his residence the petitioner has behaved as a man "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."¹

For some years the question was put to petitioners, "If necessary, are you willing to take up arms in defense of this country?" A negative answer to this question led to a denial of the petition in *U. S. v. Schwimmer* (1929), 279 U. S. 644. This was followed in *U. S. v. Macintosh* (1931), 283 U. S. 589, and *U. S. v. Bland* (1931), 283 U. S. 636. Despite these decisions, no change was made in the required oath when the Nationality Act was revised in 1940. Yet the three earlier decisions were overruled in *U. S. v. Girouard* (1946), 328 U. S. 61, on the ground that the required oath might properly be taken by a person unwilling on religious grounds to bear arms.

The view taken by the Court in the *Girouard* case has now received the sanction of Congress. As amended by §29 of the Internal Security Act of 1950, §335 of the Nationality Act of 1940 prescribes an oath by which, in addition to swearing to support and defend the Constitution, the petitioner must swear "to bear arms on behalf of the United States when required by law, or to perform non-combatant services in the Armed Forces of the United States when required by law," unless by clear and convincing evidence the petitioner can show "to the satisfaction of the naturalization court that he is opposed to the bearing of arms or the performance of non-combatant service in the Armed Forces of the United States by reason of religious training and belief." In this latter case, the text of an alternative oath requires the petitioner to state that he will "support and defend the Constitution of the United States of America against all enemies, foreign and domestic" without mention of willingness to bear arms.

In contrast with the law of the United States on this matter, it may be pointed out that the British Nationality Act, 1948, prescribes a simpler form of oath, by which an applicant for naturalization merely swears that he "will be faithful and bear true allegiance to His Majesty King George the Sixth His Heirs and Successors according to law."²

MANLEY O. HUDSON

¹ The Act of 1790 required an oath or affirmation "to support the Constitution of the United States." The Act of 1795 added that the naturalization court shall be satisfied that the applicant is "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." See H. B. Hazard, "Attachment to the Principles of the Constitution," this JOURNAL, Vol. 23 (1929), p. 783.

² Public Law 831—81st Congress, 2d Sess., p. 35.

³ 11 & 13 Geo. 6, c. 56, first schedule.

CURRENT NOTES

NOTICE OF MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, A CORPORATION

On September 20, 1950, Public Law 794 (81st Congress, 2nd Session)¹ an Act to incorporate the American Society of International Law, was signed by President Truman. On November 11, 1950, a special meeting of the Executive Council of the unincorporated Society was held, at which the charter was accepted and arrangements made for transfer of the assets and property of the unincorporated body to the corporation on May 1, 1951, after the corporation is completely organized. This action was taken pursuant to the resolution passed at the annual meeting of the Society on April 28, 1950, in anticipation of passage of the Act of Congress.²

Preliminary organization of the new corporation was also effected on November 11, 1950. A meeting was held of the persons named in the Act as constituting the initial governing board or Executive Council of the corporation. This body accepted the charter, chose Manley O. Hudson as its presiding officer, and directed that a business meeting of all members of the Society be called for April 28, 1951, to complete the organization of the corporation, elect officers and take such other action as may be necessary under the provisions of the statute.

Notice is hereby given to all members of the American Society of International Law, in accordance with the aforesaid action of the Executive Council of the corporation, that a meeting is called for 11 a.m. on April 28, 1951, at the usual meeting place of the Society, for the purpose of taking action on the above matters and any other measures necessary to complete the organization of the Society as a body corporate in accordance with the aforesaid Act of Congress.

December 1, 1950

MANLEY O. HUDSON
Chairman of the Executive Council

RESOLUTION ADOPTED AT THE INITIAL MEETING OF THE EXECUTIVE COUNCIL OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, A CORPORATION

November 11, 1950

The persons whose names are signed at the end of this resolution, being persons designated by name in Section 1 of the Act of Congress of September 20, 1950, hereinafter referred to, accept the charter granted by the said Act, and acting by virtue of Section 3 of the said Act as the initial governing board or Executive Council of the corporation created by said Act, hereby adopt the following resolution:

¹ Reprinted below, p. 158.

² Reprinted below, p. 158.

Whereas, by Section 1, of the Act of Congress entitled "An Act to incorporate the American Society of International Law, and for other purposes," approved September 20, 1950 (Public Law 794—81st Congress, Chapter 958—2nd Session), the persons designated by name in the said section, and such other persons as were on the effective date of the Act members of the unincorporated association known as the American Society of International Law and their successors were created and declared to be a body corporate by the name of The American Society of International Law;

Whereas, Section 3 of the said Act provides that the governing board of the said body corporate shall be an Executive Council the members of which shall initially be the persons designated by name in Section 1 of the Act;

Whereas, by Section 5 of the said Act, the corporation created by the said Act is given, among other powers, the power to adopt, amend, apply, and administer a constitution, by-laws, and regulations, not inconsistent with the laws of the United States or any State in which the corporation is to operate, for the management of its property and the regulation of its affairs; and

Whereas, the Executive Council of the unincorporated association known as the American Society of International Law has this day adopted and communicated to the Executive Council of The American Society of International Law, a corporation, a resolution which reads as follows:

"*Whereas*, the American Society of International Law, an unincorporated association, adopted at its annual meeting on April 28, 1950, a resolution, a copy of which is annexed hereto, empowering the Executive Council of the said Society to accept a charter of the tenor and form provided for in two bills (S.3132 and H.R. 7990) which were then pending in the Congress of the United States, with such amendments, made by Congress, as are, in the judgment of the said Council, not inconsistent with the effective prosecution of the purposes of the said Society;

"*Whereas*, by the same resolution, the said Society directed that upon the granting of such charter the property and business of the said Society be transferred to the corporation so formed; and

"*Whereas*, the Congress of the United States thereafter passed and the President of the United States approved, on September 20, 1950, an Act (Public Law 794—81st Congress, Chapter 958—2d Session) which is substantially identical with the bills referred to in the aforesaid resolution and is in the judgment of this Council, not inconsistent with the effective prosecution of the purposes of the said Society;

"The Executive Council of the American Society of International Law, an unincorporated association, hereby resolves:

"1. That the Executive Council of the American Society of International Law, an unincorporated association, accepts, on behalf of the said Society, the charter granted by the Act of Congress, Public Law 794—81st Congress, Chapter 958—2d Session, approved September 20, 1950;

"2. That George A. Finch, a Vice President of the said Society, and Edgar Turlington, Treasurer of the same, or their successors are hereby authorized and directed, upon the organization of The American Society of International Law, the corporation created by the said Act of Congress, to transfer to the said corporation all the property and business of the said unincorporated association; to execute and deliver any and all instruments which may be necessary or desirable for the transfer of the said property and business; and to take any and all necessary action toward transferring the said property and business and closing the books of the said unincorporated association as of the date on which it will be succeeded by the corporation;

"3. That the transfer of the said property and business shall take place as of May 1, 1951, or as soon thereafter as may be possible, and upon completion thereof the American Society of International Law, an unincorporated association, shall terminate and cease to exist except for purposes of liquidation;

"4. That the Committee on Finance of the American Society of International Law, an unincorporated association, is hereby authorized and directed to make appropriate arrangements for an audit, by a certified public accountant, of the property and business of the said Society as of the date of the transfer."

The Executive Council of The American Society of International Law, a corporation, hereby:

1. Accepts the charter granted by the aforesaid Act of Congress.
2. Designates Manley O. Hudson as Chairman of the Executive Council.
3. Authorizes and requests its said Chairman to call a meeting of all members of The American Society of International Law, a corporation, to convene at 11 a.m. on the twenty-eighth day of April, 1951, for the purpose of adopting a constitution, by-laws and regulations, pursuant to the provisions of Section 5 of the aforesaid Act, and electing officers of the said Society and other members of its Executive Council, and for such other corporate action as may be appropriate or necessary in view of the provisions of the said Act and of the aforesaid resolution of the Executive Council of the aforesaid unincorporated association.
4. Approves and submits for action at the said meeting the following:
 - (a) The corporation accepts incorporation provided for in the Act of Congress approved September 20, 1950 (Pub. Law 794, 81st Congress, Chap. 958, 2d Session).
 - (b) The corporation adopts as its constitution, by-laws and regulations the constitution, by-laws and regulations of the American Society of International Law, an unincorporated association.
 - (c) The persons now serving as President, Honorary President, Vice Presidents, Honorary Vice Presidents, Secretary, Treasurer, Assistant Treasurer, Executive Secretary, and members of the Executive Council of the said unincorporated association shall serve in the same capacities on behalf of the corporation from the date of the said meeting until the expiration of the periods for which they were chosen by the said unincorporated association.

(d) The committees and employees of the unincorporated association shall become committees and employees of the corporation on the date of the transfer of the property and business of the association to the corporation.

(e) The corporation adopts as its seal the seal of the unincorporated association, with appropriate modifications.

(f) The corporation designates as its agent in the District of Columbia, to accept service of process for the corporation, Charles G. Fenwick, a member of the corporation residing at 2269 Cathedral Avenue, N. W.

(g) The corporation authorizes Lester H. Woolsey and Charles G. Fenwick to accept for the corporation the property and business of the unincorporated association, subject to all liabilities and obligations of the association, and to execute and deliver any and all instruments which may be necessary or desirable in connection with the acceptance of the said property and business.

Manley O. Hudson
George A. Finch
Charles G. Fenwick
Lester H. Woolsey
Edward Dumbauld

Edgar Turlington
Mary-Agnes Brown
Stanley K. Hornbeck
Myres S. McDougal
Francis B. Sayre

RESOLUTION ADOPTED BY THE AMERICAN SOCIETY OF INTERNATIONAL LAW
AT ITS ANNUAL MEETING ON APRIL 28, 1950

Resolved, That the Executive Council is hereby empowered to accept, on behalf of the American Society of International Law, a charter of the tenor and form introduced in the Senate of the United States on February 27, 1950 (S. 3132), and in the House of Representatives on April 3, 1950 (H.R. 7990), and laid before the Society on the 28th day of April, 1950, with such alterations and amendments thereto as may be imposed by Congress and are not, in the judgment of the Executive Council, inconsistent with the effective prosecution of the purposes of the Society.

Upon the granting of such charter, the property and business of the Society shall be transferred to the corporation so formed and a meeting of the Executive Council shall be called for the purpose of regulating and directing the further conduct of the business of the Society.

The present Constitution and By-Laws of the Society shall remain in force and effect so far as not inconsistent with the charter granted.

AN ACT
TO INCORPORATE THE AMERICAN SOCIETY OF INTERNATIONAL LAW,
AND FOR OTHER PURPOSES

(Public Law 794, 81st Congress, Ch. 958, 2d Sess. [H.R. 7990])

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following persons, citizens of the United States and members of the executive council of the

unincorporated association known as the American Society of International Law, to wit: Manley O. Hudson, of Cambridge, Massachusetts, president of the said society; Dean G. Acheson, of Washington, District of Columbia, honorary president of the same; George A. Finch, of Chevy Chase, Maryland; Edwin D. Dickinson, of Philadelphia, Pennsylvania; and Philip C. Jessup, of New York, New York; vice presidents of the same; Philip Marshall Brown, of Washington, District of Columbia; Frederic R. Coudert, of New York, New York; William C. Dennis, of Richmond, Indiana; Charles G. Fenwick, of Washington, District of Columbia; Cordell Hull, of Washington, District of Columbia; Charles Cheney Hyde, of New York, New York; Robert H. Jackson, of McLean, Virginia; Arthur K. Kuhn, of New York, New York; George C. Marshall, of Leesburg, Virginia; Henry L. Stimson, of New York, New York; Elbert D. Thomas, of Salt Lake City, Utah; Charles Warren, of Washington, District of Columbia; George Grafton Wilson, of Cambridge, Massachusetts; and Lester H. Woolsey, of Chevy Chase, Maryland; honorary vice presidents of the said society; Edward Dumbauld, of Uniontown, Pennsylvania, secretary; and Edgar Turlington, of Chevy Chase, Maryland, treasurer of the same; Edward W. Allen, of Seattle, Washington; Mary Agnes Brown, of Washington, District of Columbia; Florence Brush, of Bronxville, New York; Kenneth S. Carlston, of Urbana, Illinois; Ben M. Cherrington, of Denver, Colorado; Percy E. Corbett, of New Haven, Connecticut; Willard B. Cowles, of Lincoln, Nebraska; William S. Culbertson, of Washington, District of Columbia; John S. Dickey, of Hanover, New Hampshire; Alwyn V. Freeman, of Los Angeles, California; Ernest A. Gross, of Manhasset, New York; Stanley K. Hornbeck, of Washington, District of Columbia; A. Brunson MacChesney, of Chicago, Illinois; William Manger, of Washington, District of Columbia; Charles E. Martin, of Seattle, Washington; John Brown Mason, of Oberlin, Ohio; Myres S. McDougal, of New Haven, Connecticut; Hans J. Morgenthau, of Chicago, Illinois; Durward V. Sandifer, of Chevy Chase, Maryland; Francis B. Sayre, of Washington, District of Columbia; Carl B. Spaeth, of Palo Alto, California; Robert B. Stewart, of Medford, Massachusetts; and Albert C. F. Westphal, of Albuquerque, New Mexico; and such other persons as are now members of the said society, and their successors, are hereby created and declared to be a body corporate, by the name of The American Society of International Law.

PURPOSES

SEC. 2. The purposes of the corporation are and shall be to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. The corporation shall not be operated for profit, and no part of its income or assets shall inure to any of its members, or its officers or other members of

its executive council, or be distributable thereto otherwise than upon dissolution or final liquidation of the corporation. The corporation, and its officers and other members of its executive council shall not, as such, contribute to or otherwise support or assist any political party or candidate for elective public office.

EXECUTIVE COUNCIL AND OFFICERS

SEC. 3. The governing board of the corporation, subject to the directions of the corporation at its annual meetings and at such other meetings as may be called pursuant to the provisions of its constitution, bylaws, and regulations, hereinafter mentioned, shall be an executive council consisting of a president, an honorary president, a number of vice presidents, and honorary vice presidents to be determined by the constitution of the corporation, a secretary, a treasurer, and not less than twenty-four additional persons. The officers of the corporation and one-third of the other members of the executive council shall be elected at each annual meeting of the corporation: *Provided, however*, That the executive council may be authorized by the constitution of the corporation to elect the secretary and the treasurer of the corporation for specified terms and to fill vacancies until the next annual meeting of the corporation. The number of members of the executive council shall initially be forty-four, and the members of the said council shall initially be the persons whose names and addresses are set forth in section 1 hereof.

PRINCIPAL OFFICE AND ACTIVITIES

SEC. 4. The corporation shall have its principal office in the District of Columbia and shall have the right to conduct its activities in the said District and at any other place or places in the United States.

CORPORATE SUCCESSION AND POWERS

SEC. 5. The corporation shall have succession by its corporate name and shall have power to sue and be sued, complain and defend in any court of competent jurisdiction; to adopt, use, and alter a corporate seal; to choose such officers, managers, and agents as its business may require; to adopt, amend, apply, and administer a constitution, bylaws, and regulations, not inconsistent with the laws of the United States of America or any State in which the corporation is to operate, for the management of its property and the regulation of its affairs; to contract and be contracted with; to take and hold by lease, gift, purchase, grant, devise, or bequest, in full title, in trust, or otherwise, any property, real or personal, necessary for attaining the objects and carrying into effect the purposes of the corporation, subject however, to applicable provisions of law of any State (A) governing the amount or kind of real and personal property which may be held by, or (B) otherwise limiting or controlling the ownership of real and personal prop-

erty by, a corporation operating in such State; to transfer and convey real or personal property; to borrow money for the purposes of the corporation, and issue bonds therefor, and secure the same by mortgage subject in every case to all applicable provisions of Federal or State laws; to publish a journal and other publications, and generally to do any and all such acts and things as may be necessary and proper in carrying into effect the purposes of the corporation.

LIABILITY FOR ACTS OF OFFICERS AND AGENTS; SERVICE OF PROCESS

SEC. 6. The corporation shall be liable for the acts of its officers and agents. It shall have in the District of Columbia at all times a designated agent authorized to accept service of process for the corporation; and notice to or service upon such agent, or mailed to the business address of such agent, shall be deemed notice to or service upon the corporation.

ISSUES OF STOCK, DECLARATION AND PAYMENT OF DIVIDENDS, LOANS TO OFFICERS AND MEMBERS OF EXECUTIVE COUNCIL PROHIBITED

SEC. 7. The corporation shall not issue shares of stock, nor declare or pay dividends, nor make loans or advances to its officers or members of its executive council or any of them. Any member of its executive council who votes for or assents to the making of a loan or advance to an officer of the corporation or to a member of its executive council, and any officer or officers participating in the making of any such loan or advance, shall be jointly and severally liable to the corporation for the amount of such loan or advance until the repayment thereof.

BOOKS AND RECORDS

SEC. 8. The corporation shall keep correct and complete books and records of account. It shall also keep minutes of the proceedings of its members, executive council, and committees having any of the authority of the said council. It shall also keep at its principal office a record giving the names and addresses of its members entitled to vote. All books and records of the corporation may be inspected by any member or his agent or attorney, for any proper purpose, at any reasonable time.

ANNUAL AUDIT

SEC. 9. There shall be an annual audit of the financial transactions of the corporation and of the pertinent books and records of the corporation by a certified public accountant, at the expense of the corporation, and the said audit shall be filed with the Congress.

DURATION

SEC. 10. The duration of the corporation shall be perpetual.

ACQUISITION OF ASSETS OF EXISTING AMERICAN SOCIETY OF INTERNATIONAL
LAW

SEC. 11. The corporation may and shall acquire all of the assets of the existing unincorporated association known as the American Society of International Law, subject to any liabilities and obligations of the said association.

RESERVATION OF RIGHT TO ALTER, REPEAL, OR AMEND

SEC. 12. The right to alter, repeal, or amend this Act is hereby expressly reserved to Congress.

Approved September 20, 1950.

IS THE NORTH ATLANTIC TREATY A REGIONAL ARRANGEMENT?

In a recently published pamphlet¹ Sir W. Eric Beckett, the Legal Adviser to the British Foreign Office, tries to prove that the North Atlantic Treaty is not a regional arrangement. His main argument is that the organization of collective self-defense, the principal purpose of the North Atlantic Treaty, is not mentioned in Chapter VIII of the Charter dealing with regional arrangements,² and hence not a subject-matter to be regulated by such arrangements; that the enforcement actions which are possible under regional arrangements are essentially different from the use of force in the exercise of collective self-defense,³ the one being an action "decided on or approved by the Security Council," an "enforcement action" in the specific sense of this term, the other an action prior to any enforcement action in the specific sense of the term. Besides, "the hall-mark of a regional arrangement" constituting a regional union is the provision "that enforcement measures are to be taken in case of a conflict between any two or more of the Members of this union."⁴ Since the North Atlantic Treaty "does not contemplate that, if a party to the North Atlantic Treaty violates the peace, the other parties should be the medium of taking enforcement action against it," this Treaty is not a regional arrangement.⁵

The Charter does not define the concept "regional arrangement." The answer to the question as to what a regional arrangement within the meaning of the Charter is, must be derived from the provisions of Chapter VIII. These provisions allow the assumption that a regional arrangement is an international agreement entered into by some, not all, the Members of the United Nations. An agreement to which all the Members would be parties could not be considered as "regional." But it is not required that the parties to the regional agreement be geographically neighbors. It is essen-

¹ The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations (London, Stevens & Sons, 1950). Reviewed in this JOURNAL, Vol. 44 (1950), p. 795.

² *Op. cit.*, p. 16.

³ *Ibid.*

⁴ *Ibid.*, p. 21.

⁵ *Ibid.*, p. 34.

tial only that the actions of the organization established by the regional arrangement be restricted to a certain area, determined in the agreement. The action taken under the agreement must have the character of "regional action."

As to the subject-matter to be regulated by the agreement, Article 52 provides that it must deal "with such matters relating to the maintenance of international peace and security as are appropriate for regional action." There can be no doubt that the organization of collective self-defense is a matter relating to the maintenance of international peace and security. In view of the fact that the system of collective security established by Chapter VII does not work, collective self-defense is, for the time being, the only effective means for the maintenance of international security applicable under the Charter. If the concept of "regional arrangement" is determined in accordance with Article 52, it is quite possible to consider the organization of collective self-defense as a matter which can be regulated by such arrangements.

Since the North Atlantic Treaty expressly restricts the exercise of collective self-defense, imposed as an obligation upon the parties in Article 5 of the Treaty, to an area determined in the Treaty and expressly called in Article 6 and other articles the "North Atlantic area," the Treaty fulfils all the requirements of an agreement which, according to the provisions of Chapter VIII, may be considered as a regional arrangement.

That "there is in fact in Chapter VIII nothing about this inherent right of self-defense at all,"⁶ is no reason to assume that a regional arrangement cannot regulate the exercise of the right of collective self-defense. Chapter VIII does not contain an exhaustive enumeration of the matters which may be regulated by regional arrangements. It determines these matters in a general way. The matters expressly mentioned, such as settlement of local disputes, and enforcement action against former enemy states, are by no means the only matters to which regional arrangements may refer.

The argument that regional arrangements can authorize only enforcement actions essentially different from the actions involving the use of force in the exercise of collective self-defense, has no basis in the wording of the Charter. It is true that the Charter in Article 2, paragraphs 5 and 7, and in Article 50 uses the term "enforcement action" or "enforcement measure" to designate the use of force by the Security Council. Even in the first sentence of Article 53, paragraph 1, the term "enforcement action" has this meaning. But in the second sentence of that paragraph the term cannot have the same meaning. The paragraph reads:

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional

⁶ *Op. cit.*, p. 16.

arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until . . .

According to the wording of this paragraph, action taken against a former enemy state under Article 107 or against renewal of aggressive policy on the part of any such state is, if such action involves the use of force, an enforcement action and as such is permitted, although it is neither decided on or approved by the Security Council. The use of force in the exercise of the right of self-defense too, is an enforcement action in this sense, that is to say, an enforcement action taken, not by the Security Council, but by Members of the United Nations.

It is true that enforcement action in the exercise of the right of self-defense is not mentioned among the enforcement actions which may be taken under a regional arrangement without the authorization of the Security Council. The explanation may be that the framers of the Charter considered it superfluous to refer expressly to the exercise of self-defense as an exception to the rule that no enforcement action shall be taken without the authorization of the Security Council. For Article 51 provides that nothing in the Charter (hence also not the provision of Article 53 that no enforcement action shall be taken without the authorization of the Security Council) shall impair the right of individual and collective self-defense, that is, the right to take enforcement action against a state guilty of an armed attack prior to any intervention on the part of the Security Council. But it may also be that the framers of the Charter did not take into consideration the possibility of organizing collective self-defense through regional arrangements, since they recognized the exercise of the right of self-defense only as a provisional measure to be taken within the short period of time between the occurrence of an armed attack and the putting into operation of the machinery of collective security by the Security Council. The framers of the Charter did not anticipate that the system of collective security laid down in the Charter will not work at all, and they certainly did not intend collective self-defense as a substitute for collective security. But the wording of the Charter does not exclude organization of collective self-defense through regional arrangements even as a substitute for the paralyzed system of collective security. It may not be in conformity with the intention of the framers of the Charter to organize collective self-defense by a treaty; but if a treaty is concluded by some Members of the United Nations for the purpose of organizing collective self-defense restricted to a certain area, this treaty may be considered as a regional arrangement; and the rule of Article 53, that no enforcement action shall be taken without the authorization of the Security Council, does not apply to the exercise of the right of collective self-defense organized in the regional arrangement, because this rule is restricted by Article 51.

Hence, there is no cogent reason to assume that the North Atlantic Treaty is not a regional arrangement because it regulates the organization of collective self-defense and because the organization of collective self-defense is no subject-matter of a regional arrangement, the enforcement action taken in the exercise of collective self-defense being different from the enforcement action which may be taken under a regional arrangement.

The only difference which exists between an enforcement action in the specific sense of this term, that is to say, within the meaning of Article 2, paragraphs 5 and 7, Article 50 and Article 53, paragraph 1, first sentence, and enforcement action taken in the exercise of the right of self-defense or in conformity with Article 53, paragraph 1, second sentence, is that the enforcement action in the specific sense is action involving the use of force taken by the Security Council, whereas enforcement action in a non-specific sense is an action involving the use of force not taken by the Security Council. The assumption that the enforcement action taken in the exercise of the right of collective self-defense organized by a treaty must be directed against a state which does not belong to the organization established by the treaty, whereas the enforcement action to be taken under a regional arrangement is to be directed against a state member of the regional organization,⁷ and that, consequently, the North Atlantic Pact is no regional arrangement because it does not contemplate that, if a party violates the peace, the other parties should be the medium of taking enforcement action against it,⁸ has no basis either in the Charter or in the North Atlantic Treaty. That regional arrangements may provide for enforcement action against states not parties to the regional arrangement is not only not excluded by the wording of Articles 52 and 53 but Article 53 expressly refers to enforcement actions against former enemy states, whether these states are or are not members of the regional organization. It is more than probable that the framers of the Charter did not suppose that former enemy states would be members of a regional organization within the meaning of Chapter VIII. The original idea was that regional arrangements would be directed *against* former enemy states.

As to collective self-defense stipulated in Article 51, nothing in the wording of this article can be interpreted to mean that the enforcement action taken in the exercise of collective self-defense must not be directed against an aggressor who is a party to the treaty organizing the collective self-defense. Nor does the wording of the North Atlantic Pact exclude the application of its Article 5 against an aggressor who is a contracting party to the Pact. It is true that the Pact is concluded in the first place as a defense against a possible aggressor who is not a party to the Pact. But, for good reasons, in the wording of the Pact everything has been avoided that could betray this intention. Under Article 10 of the Pact, the possibility is not even excluded of inviting this state to accede to the Pact.

⁷ *Op. cit.*, pp. 21 ff.

⁸ *Ibid.*, p. 34.

Hence it is hardly possible to deny the possibility of interpreting the North Atlantic Treaty as a regional arrangement within the meaning of Chapter VIII of the Charter. This seems to be the most plausible, but it is not the only possible interpretation. Since the Charter does not define the concept of regional arrangement and especially since the exercise of collective self-defense is not expressly referred to in Article 53, it is not impossible to consider a treaty for the implementation of Article 51 as an agreement different from a regional arrangement. As in so many cases, the Charter allows contradictory interpretations.

HANS KELSEN

"DE FACTO" STATES: SOVEREIGN IMMUNITIES

The administration of a part of the territory of a state by a rebel government for a time, and a long time, is no new thing. There is an excellent instance of it in the case of the Confederate States of America, which administered considerable territory of the United States for some four years. It was necessary for the Powers of Europe to take some notice of what was transpiring in the Southern States, and not to treat them as completely blotted off the map. It was never thought necessary, however, by European and South American governments, nor by their courts of law, to accord to the Confederates the singular status of "a *de facto* sovereign state"—a complete monstrosity: an international chimæra or griffin. For a *de facto* sovereign state is *de jure* sovereign.

Ever since the time of Jefferson, this has been a commonplace of statesmen; and it has saved nations from all the confusion and difficulty incident to pronouncing on foreign constitutions and foreign ideologies. Anyone who had the settled and secure control of a territory was *de jure* (if you like the phrase—it means nothing) sovereign of it. The grudging and scanty recognition of temporarily successful rebels—never extending to diplomatic intercourse with them—was termed *recognition of belligerency*, and it was understood to cover as little intercourse as might be. It went not a step beyond the recognition of the validity of daily business acts. It did not extend to render valid the disposal of the state's resources by the rebel administration. In fact, it amounted to the validation of much the same acts as were permitted to a military occupant.

But, about the year 1915, with the unsettled era of world-wide wars, the chimæra came flying into the world scene. People began to talk about a "de facto" government. This novel locution seems to have definitely arisen at the time when, one after another, ephemeral governments sprang up to take control in Mexico. They had to be recognized, for practical ends, but the governments of the world, for some inscrutable reason, preferred not to treat with them either as normal states or in the cautious fashion in which they had previously treated *de facto* belligerents; but, while entering into diplomatic relations with them, it was thought fit to stigmatize them as mere "*de facto*" states. In that capacity, they were

pushed to the bottom of the diplomatic list; but nobody ever troubled to declare to what extent and in what way these quasi-states differed from normal states on the one hand, and belligerent communities on the other.

Professor Larnaude of the Sorbonne, with all the weight of his learning and experience, commented sharply that all this desire to avoid the normal consequences of successful revolt and the assumption of settled control by the rebels, was a headlong affront to custom and common sense. Nobody knew what the limits were of the powers of such a questionable and degraded government. The rule that the international powers of a belligerent community were to be as nearly *nil* as possible seemed clearly to be abandoned as inapplicable to such very successful rebels, who had completely subverted the old government; but what was the new limit to be? "Nobody answered; for nobody knew!"

Apparently no one has as yet attempted to supply the deficiency. If anyone does, the information must be spun out of his own brain. This cannot be called a satisfactory state of affairs, or a credit to the world's statesmen. In still more recent days, the precipitate "de facto" recognition of rebels against a ruler who is still resisting with the support of an army in the field, or with the active help of Allied Powers, is attended by quite unknown and uncertain consequences; it is in fact an attempt to establish diplomatic relations with an authority which has not the full marks of a state, and may never have them.

The results of admitting to sovereign status a rather successful rebel against a friendly Power, dangling like Mahomet's coffin in the air, with neither the rights of a normal state nor those of a mere belligerent, were thrown into a clear light by Professor Preuss in his valuable paper in the *AMERICAN JOURNAL OF INTERNATIONAL LAW* for April, 1941.¹ Professor Preuss shows how the British House of Lords was unaccountably induced to invest the Franco government, which was (I may be forgiven for saying, very rightly) in revolt against the recognized Government of Spain,² with all the powers of a sovereign government *quoad* the Basque Provinces, of which it was in complete, if possibly temporary, *de facto* control; and to hold it entitled to requisition ships registered at Basque ports.³

Now could the Confederate Government at Richmond have assumed control over a Baltimore merchantman at Queenstown or Liverpool, and vindicated that assumption against the New York owner? Can one imagine such a thing as possible? It would have been a startling impossibility.

It is the misleading and meaningless phrase, "de facto" sovereignty, that causes such mysterious modern decisions. The Judges in the House of Lords, faced with an *ex cathedra* statement from the Foreign Office that

¹ Vol. 35 (1941), p. 263.

² That government is said to have been installed by a Chamber elected by a minority vote, and to have evinced ruthless persecuting activities.

³ *The Arantzazu Mendi*, L. R., [1939] A. C. 256.

the Franco government was "exercising *de facto* effective administrative control over the Basque Provinces" and was "not subordinate to any other government"—a fair definition of a belligerent authority—fell, tempted by the magic word "*de facto*," into the trap of holding that government "*de facto* sovereign," involving the attribution to it of unlimited sovereign powers *quoad* the Basques. That pronouncement had been obtained by the courts from the Foreign Office in order to supply their own supposed deficiencies in matters having an international bearing. Unlike Lord Stowell, who declined to accept the Government's assurance that a blockade of Cadiz and Seville still existed when it patently did not,⁴ modern courts are not content to ask the government for facts, but for the legal interpretation of the facts, forgetting that this is precisely their own function. What are judges for?⁵

It is unnecessary to repeat what has been so well said by Professor Preuss in criticism of the fluctuating and nerveless pronouncements in the successive cases of *The Gagara*,⁶ *The Annette* and *The Dora*,⁷ *The Jupiter*,⁸ *Bank of Ethiopia v. Bank of Egypt*,⁹ *Bank of Bilbao v. Sancha*,¹⁰ *The Cristina*,¹¹ *The Arraiz*,¹² *El Neptuno*,¹³ *The Abodi Mendi*,¹⁴ the *Cable and Wireless Case*,¹⁵ and *The Arantzazu Mendi*.¹⁶ With them we may, in a spirit of sober satisfaction, contrast the strong good sense evinced by the Edinburgh Court of Session in the later case of *El Condado*,¹⁷ when the recognized Madrid Government was the plaintiff, claiming damages for the temporary interdict laid upon the vessel when lying under its control at Greenock. The Scottish Court examined and rejected the plaintiff government's claim to ownership of the vessel, on the ground that "legislation of a confiscatory character will not be held to affect property situated in this country." And it is plain that the judges did not like *The Cristina*, in which case the startling dogma had been adopted that a wrongful act committed in Great Britain would produce valid legal effects, if only it was perpetrated on the orders of a foreign sovereign.

It would, indeed, be ridiculous if a foreign state could fail as a plaintiff, and succeed as a defendant; and it would be not only ridiculous, but in the highest degree unjust and anarchic, if a foreign state could, merely by slyly obtaining possession *vi, clam* or *precario*, oust the jurisdiction of the English courts to protect the property of an Englishman in England. The House

⁴ *The Triheten*, (1805) 6 C. Robinson 65.

⁵ "The Chevalier d'Almeida [Portuguese Plenipotentiary] is not a professor of the law, but a diplomat; and therefore incompetent to instruct us in questions of law." Lord Stowell (Sir Wm. Scott) in *The Santa Cruz*, 1 C. Robinson 70.

⁶ L. R., [1919] P. 95.

⁷ *Ibid.* 105.

⁸ *Ibid.*, [1924] P. 236.

⁹ *Ibid.*, [1937] 1 Ch. 513.

¹⁰ *Ibid.*, [1938] 2 K.B. 176.

¹¹ *Ibid.*, [1938] A.C. 485.

¹² 61 Lloyd's List Reports 39.

¹³ 62 Lloyd's List Reports 7.

¹⁴ [1939] P. 178.

¹⁵ L. R., [1939] 1 Ch. 182.

¹⁶ *Ibid.*, [1939] A.C. 256.

¹⁷ (1939) 63 Lloyd's List Reports 83.

of Lords, acting on a surely very *simpliste* interpretation of the admitted doctrine that a sovereign cannot be sued in a British court of law, applied the ordinary principles of agency to the case, and disregarded the fact they do not apply to the transactions of sovereigns. They do not apply to the English Sovereign. He can do no wrong; but the inference is not that his agents can do no wrong, but that for any wrong that is done, at his command or for his benefit his agents are responsible. His commands involve him in no responsibility, but they do not make the wrongs rightful, or clothe them for his benefit with legal effects. That is a commonplace of constitutional law. A royal command does not make a tort rightful; it remains the tort of the actual perpetrator, and it produces no more legal effects than any other tort. It is incredible that the command of a foreign sovereign should have any more extensive operation. The opinion is confidently advanced that *The Cristina* was *simpliste* and wrong. The Spanish sovereign was not in possession; his consul was certainly his agent; but he was not his agent to break the laws of England.

In *The Cristina* possession had been admittedly acquired *clam*, if not *vi*. To hold that it had so been vested in an irresponsible sovereign would be as extravagant in morals as the claim of the old French king—"to order one servant called a colonel to imprison a man, and another servant called a judge to declare him lawfully imprisoned." What the French king might please to do in France might well be extravagant in morals; it is ludicrous to hold that a foreign rule can imitate that extravagance in England.

It is not advanced for a moment that a foreign sovereign can be sued on torts committed by his agents. All that is maintained is that his command is no excuse; that the torts remain their torts, and produce no wider effects than other wrongs committed by them. It is conceived that the true proposition applicable to the case of *The Cristina*, and the only one consistent with national independence is: "Neither title nor constructive possession can be attributed in England to a foreign sovereign where they have been obtained in England by his agents by means contrary to English law."¹⁸

The writ *in rem* of the Spanish owners of *The Cristina*, claiming the restitution of possession, did not (as Lord Wright held, again with a *simpliste* application of the established principle that a claimant by such a writ makes all parties defendants who care to claim an interest in the *res*) therefore extend to making an irresponsible sovereign a defendant.

A foreign sovereign is not exempt from the rule that a litigant must come into court with clean hands. His counsel cannot be heard to say that he had instructed his servants in England to break the English law, and to take clandestine possession of what he does not demonstrate to be his property or quasi-property. It is not enough for him, although a sovereign, to

¹⁸ Including, of course, its rules of private international law.

say that it is his property, or while admitting the property of the claimant, to say that he has taken it from him by inadmissible means of confiscation. By that he states himself out of court. He shows neither property nor such a lawful possession by his agents as can constructively or legally be attributed to himself.

Suam turpitudinem allegans, nemo audietur!—No one, not even a sovereign, can be heard to allege his own tortious possession obtained in England on no clear title to possess.

T. BATY

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DRAFT INTERNATIONAL COVENANT ON HUMAN RIGHTS REVISED AT 1950 SESSION
OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS

Following the revision of the draft International Covenant on Human Rights by the Commission on Human Rights at its March-May, 1950, session, and its review by the Economic and Social Council at its July-August meeting, the General Assembly on December 4, 1950, decided to return the draft Covenant to the Commission on Human Rights for its further consideration at its 1951 session.¹ At the same time the General Assembly requested the Commission on Human Rights to submit a revised draft of the Covenant to the General Assembly in September, 1951.

The Covenant, being in treaty form, when finally completed and approved by the General Assembly, will be submitted to governments for ratification and will be binding on states which ratify it.

Following the 1950 session of the Commission on Human Rights, Acting Secretary of State Webb stated that "It is vitally important that the United Nations carry forward vigorously its program for promoting and encouraging respect for human rights and for fundamental freedoms."² He observed that "One of the major aspects of United States foreign policy is to continue its support for improving the conditions of freedom everywhere through the organs of the United Nations and through all other available means."

The Draft Covenant is presently limited to basic civil and political rights which are well known in American tradition and law.

The basic civil and political rights now set forth in the draft Covenant relate to the right to life, protection against torture, slavery, forced labor, arbitrary arrest or detention, protection against imprisonment for inability to fulfil a contractual obligation, freedom to leave a country, freedom to return to one's country, right to a fair and public hearing by an independent and impartial tribunal, right to be presumed innocent until proved

¹ For previous current notes concerning the draft International Covenant on Human Rights, see this JOURNAL, Vol. 42 (1948), p. 879, and Vol. 43 (1949), p. 779.

² Department of State Press Release No. 522, May 19, 1950.

guilty, protection against *ex post facto* laws, right to recognition as a person before the law, freedom of religion, expression, assembly and association, and equal protection of the law.

Article 1 of the proposed Covenant provides in paragraph 1 that a state ratifying the Covenant undertakes

to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in this Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

Article 1 further provides in paragraph 2 that where the rights recognized in the Covenant have not already been "provided for by existing legislative or other measures, each state undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of this Covenant, to adopt within a reasonable time such legislative or other measures as may be necessary to give effect to the rights recognized in this Covenant."

The purpose of paragraph 2 of Article 1 is to make it clear that the provisions of the Covenant would not themselves be enforceable in the courts as "the supreme Law of the Land" under Article VI of the United States Constitution. The United States, however, as well as other states parties to the Covenant, would have a firm obligation to enact the requisite legislative and other measures to give effect to the rights set forth in the Covenant to the extent to which such measures have not already been enacted. Such legislative and other measures which are enacted would, of course, be enforceable in the courts of the United States.

Article 2 provides that, in the event of an emergency officially proclaimed by the authorities of a state or in the event of a public disaster, a state may derogate from the rights provided in the Covenant, except those which relate to the right to life (Article 3); freedom from torture (Article 4); freedom from slavery and servitude (Article 5); freedom from being imprisoned merely on the ground of inability to fulfil a contractual obligation (Article 7); protection from *ex post facto* laws (Article 11); the right to recognition as a person before the law (Article 12); and freedom of religion (Article 13). It was agreed that, in any case, no derogation should occur which is incompatible with international law. Any state derogating from the Covenant under Article 2 is required to inform the other states parties to the Covenant of the provisions from which it derogates and when the derogation ends.

Article 3 is the result of a great deal of discussion of two conflicting views pressed in the Commission. One view was that the right to life in this article should be set forth in general terms only, and the other view was that specific exceptions to the right to life should be set forth in detail.

It was finally agreed that the first paragraph of this article should set forth in general language that "Everyone's right to life shall be protected by law." This general statement is followed by a statement that "To take life shall be a crime, save in the execution of a sentence of a court, or in self-defense, or in the case of enforcement measures authorized by the Charter." Considerable sentiment was expressed in the Commission that further consideration should be given to the latter statement in the further review of the draft Covenant.

The Commission approved the language previously in Article 4 prohibiting anyone from being subjected to torture or to cruel, inhuman, or degrading treatment or punishment. The Commission also decided to include a provision prohibiting anyone from being subjected against his will to medical or scientific experimentation. In adopting the latter provision, the members of the Commission observed that the language they approved would need further careful reconsideration in the light of such recommendations concerning this language as may be made by the World Health Organization.

Article 5 prohibits slavery, the slave trade, and servitude without exception, and prohibits forced and compulsory labor, subject to certain specified exceptions such as services required to be done in the course of detention in consequence of a lawful order of a court. The Commission used the term "servitude" to cover only such limited matters as serfdom, peonage, and related aspects of slavery, excluding, however, forced or compulsory labor which is set forth with its exceptions separately in this article.

Article 6 provides protection against arbitrary arrest or detention. The Commission used the term "arbitrary" to prohibit any "unjust" arrest or detention as well as any illegal arrest or detention. Paragraph 5 of this article sets forth the well-known safeguards of habeas corpus, that is,

anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided without delay by a court and his release ordered if the detention is not lawful.

Paragraph 6 provides that "Anyone who has been the victim of unlawful arrest or deprivation of liberty shall have an enforceable right to compensation." The United States representative urged the omission of this paragraph.

Article 7 prohibits the imprisonment of anyone merely on the ground of inability to fulfil a contractual obligation.

Article 8 was revised to provide expressly that the right to liberty of movement and freedom to choose one's residence shall be provided only "within the territory of a State." Liberty of movement and freedom to

choose one's residence, as well as freedom to leave a country, were made subject to such general limitations as are not inconsistent with the other rights recognized in the Covenant. A new provision added in Article 8 states that no one shall be subjected to arbitrary exile. The provision previously in this article providing that anyone shall be free to enter the country of which he is a national was retained, but made subject to the provision against arbitrary exile.

Article 9 prohibits the expulsion of any alien legally admitted to the territory of a state except on established legal grounds and according to procedure and safeguards which shall in all cases be provided by law.

Article 10 guarantees everyone a fair and public hearing by an independent and impartial tribunal established by law. Certain exceptions are provided for the exclusion of the press and public from a trial where, for example, this exclusion is necessary for reasons of morals, public order, or national security. It is expressly provided that everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law. Certain minimum guarantees are provided to a defendant charged with a criminal offense. The representative of the United States urged the omission of paragraph 3 concerning compensation.

Article 11 provides protection against *ex post facto* laws, national or international.

Article 12 provides that every one shall have the right to recognition as a person before the law. Members of the Commission thought that this article was needed to preclude the possible repetition of the Nazi practice of depriving members of certain groups of their legal personality so that the courts could completely ignore their rights.

Article 13 provides for freedom of thought, conscience, and religion, including freedom to manifest one's religion or belief in teaching, practice, worship, and observance.

At the request of the General Assembly, the Commission on Human Rights drafted Article 14 on freedom of expression for inclusion in the Covenant. This article was drafted in general terms to provide that everyone shall have the right to freedom of expression, including freedom to seek, receive, and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

This freedom of expression is subject only to such restrictions as are provided by law and are necessary for the protection of national security, public order, safety, health or morals, or the rights, freedoms, or reputations of others. Although some members of the Commission sought to restrict freedom of expression further by specific limitations, the Commission rejected these proposals and decided to limit freedom of expression only in general terms along the same lines as the limitations provided

in the articles concerning freedom of religion, assembly, and association.

Articles 15 and 16 recognize the right of peaceful assembly and the right of association, subject only to restrictions prescribed by law and necessary to ensure national security, public order, the protection of health or morals or the protection of the rights and freedoms of others.

Article 17 provides that "All are equal before the law" and shall be accorded equal protection of the law without discrimination.

Article 18 points out that nothing in the Covenant may be interpreted as limiting or derogating from any of the rights and freedoms which may be guaranteed under the laws of any Contracting State or any conventions to which it is a party.

The Commission, at its 1950 session, decided to include in the Covenant Articles 19 to 41 authorizing only states parties to the Covenant to file complaints with respect to violations. A proposal to extend the right to complain to non-governmental organizations was rejected by a vote of 7 against (Australia, Belgium, Egypt, Greece, France, United Kingdom, United States), 4 in favor (Chile, India, Lebanon, Uruguay), with 3 abstentions (China, Denmark, Yugoslavia). The proposal to extend the right to complain to individuals was rejected by a vote of 8 against (Australia, Belgium, China, Egypt, France, Greece, United Kingdom, United States), 3 in favor (India, Lebanon, Uruguay), with 3 abstentions (Chile, Denmark, Yugoslavia).

The Commission approved the establishment of a permanent International Human Rights Committee to consist of 7 members who would serve for a term of 5 years each. It is proposed that the members of the Committee be elected by states parties to the Covenant. Members of the Committee will be eligible for reelection. Each state would nominate from 2 to 4 persons of high standing and of recognized experience in the field of human rights to a panel, and the members of the Committee would be elected from this panel.

It is proposed that, initially, if one state party to the Covenant considers that another state party to the Covenant is not giving effect to the provisions of the Covenant, it would call the matter to the attention of that state by a written communication. Within 3 months after the receipt of this communication, the receiving state would afford the complaining state an explanation or a statement in writing concerning the matter. If the matter is not adjusted within 6 months, either state would have the right to refer the matter to the Human Rights Committee. It is provided that the Committee would normally not deal with the matter referred to it if available domestic remedies have not been invoked and exhausted.

If local remedies have been exhausted, the Committee would ascertain the facts and make available its good offices to the states concerned with a view to a friendly solution of the matter on the basis of respect for human rights as recognized in the Covenant. In every case, the Committee would,

within 18 months, draw up a report which the United Nations would publish. If a solution of the matter is reached, the Committee would confine its report to a brief statement of the facts and the solution reached. If a solution is not reached, the Committee would state in its report its conclusions on the facts.

Article 42 provides that the Covenant will come into force as soon as 20 states have deposited their instruments of ratification or accession with the Secretary General of the United Nations.

Because of the lack of time, the Commission decided to postpone its consideration of Article 43 concerning federal states. The United States representative stressed in the Commission the importance of including a federal state article in the Covenant along the lines of the United States proposal in order to make it possible for federal states to adhere to the Covenant.

The United States proposal undertakes to make it clear that the obligations undertaken by the United States under the Covenant would be limited to matters which are determined in accordance with the constitutional processes of the United States to be appropriate for Federal action. With the inclusion of this federal state article in the Covenant, the only obligation which the United States would have with respect to matters determined not to be appropriate for Federal action will be to bring these matters to the attention of the appropriate authorities of the States in the United States with a favorable recommendation.

It was pointed out to members of the Commission that although the United States is not prepared to undertake all the obligations of the Covenant, since all the rights set forth in the Covenant do not relate to Federal matters, the United States is prepared to undertake as many of the obligations of the Covenant as are determined in accordance with the constitutional processes of the United States to be appropriate for Federal action.

The proposal submitted by the United States for inclusion in the Covenant as a federal state article reads as follows:

In the case of a Federal State, the following provisions shall apply:

(a) With respect to any articles of this Covenant which are determined in accordance with the constitutional processes of that State to be appropriate in whole or in part for federal action, the obligations of the federal government shall to this extent be the same as those of parties which are not Federal States;

(b) With respect to articles which are determined in accordance with the constitutional processes of that State to be appropriate in whole or in part for action by the constituent states, provinces, or cantons, the federal government shall bring such articles, with favourable recommendation, to the notice of the appropriate authorities of the states, provinces or cantons at the earliest possible moment.

The Commission decided not to include economic and social articles in the Covenant but, instead, to postpone the consideration of these articles until its 1951 session. Consideration at that session will particularly be given to the extent to which other organs and specialized agencies within the framework of the United Nations are already taking action with respect to these rights.

A representative of the Union of Soviet Socialist Republics attended the first meeting of the 1950 session of the Commission at which he proposed that the Commission "exclude the representative of the Kuomintang" from membership in the Commission. This proposal was ruled out of order by the Chairman, since members of the Commission, although nominated by their governments, are confirmed by the Economic and Social Council.

The Chairman pointed out that the representative of China was confirmed by the Economic and Social Council and that, accordingly, if the Soviet Union wished to challenge his membership on the Commission, this should be done in the Economic and Social Council rather than in the Commission on Human Rights. The Soviet member challenged this ruling of the Chairman, but it was sustained by a vote of 12 to 2, with Yugoslavia and the Soviet Union voting against the ruling. The representative of the Soviet Union thereupon protested against the decision of the Commission and withdrew from the meeting. The Ukraine Soviet Socialist Republic was not represented at this meeting nor at any later meeting of this session of the Commission.

At the 1949 session of the Commission, the Soviet representative at that time, A. P. Pavlov, abstained when the Commission voted to approve the report of its work. Mr. Pavlov, at the 1949 session, repeatedly sought to include provisions in the draft Covenant which would weaken the effectiveness of the rights and freedoms being safeguarded. The other members of the Commission, however, rejected his amendments to the Covenant just as they had rejected similar amendments he had proposed to the Declaration of Human Rights the previous year.³

Mrs. Eleanor Roosevelt, the representative of the United States on the Commission, was elected Chairman of the 1950 session of the Commission. She has been elected Chairman of each session of the Commission on Human Rights since its establishment in 1947.

In its review of the draft Covenant on Human Rights at its 1951 session, the Commission will consider in particular the request of the General Assembly (1) to improve the wording of some of the articles of the Covenant, (2) to study and prepare recommendations relating to the inclusion of a federal state article in the Covenant, (3) "to include in the Covenant a clear expression of economic, social and cultural rights in a manner which

³ See this JOURNAL, Vol. 43 (1949), p. 786.

relates them to the civic and political freedoms proclaimed in the Covenant," and (4) to draft provisions in the Covenant or in separate protocols for the receipt and examination of petitions from individuals and organizations with respect to alleged violations of the Covenant.

JAMES SIMSARIAN *

THE FISHERY PROCLAMATION OF 1945

The article in the October, 1950, JOURNAL on "Recent Developments in High Seas Fisheries Jurisdiction under the Presidential Proclamation of 1945," appears accurately to present the current views of the Department of State—one hesitates to use the term "policies"—insofar as such views are obtainable. However, it does not tell the whole story.

Arising directly out of the incursion of Japanese fishermen during the 1930's into the Bristol Bay red salmon fishery, the genesis of the Proclamation within the Department was the personal assurance of Secretary Cordell Hull to then Senator Schwellenbach and the writer that he would see that something *was done to stop* this intrusion. Two plans were evolved, one to secure immediate relief, the other to prevent repetition. Negotiations with Japan in 1938, referred to by Mr. Selak, were to carry out the first objective; the second ripened into the Proclamation. That its issuance was delayed until 1945 is not surprising in view of Departmental practices and the advent of war.

The Proclamation merits present interest, not because of the recent and highly commendable conclusion of the treaties referred to by Mr. Selak, for they merely follow the pattern of the international halibut and salmon treaties which long antedated the Proclamation. What deserves attention right now is that the Proclamation grew out of the necessity to meet a precise situation, *and that this necessity may shortly re-occur* if the Department persists in its announced plan *not* to incorporate any provisions for the protection of American fisheries in its proposed peace treaty with Japan.

Although the proclamation does not specifically mention salmon or Alaska, it does say:

Where such activities [fishing] have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation *and control of the United States*.

Furthermore, the concurrent official release stated: "As a result of the establishment of this *new* policy, the United States will be able to *protect effectively*, for instance, its most valuable fishery, *that for the Alaska*

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salmon." There was also a concurrent Executive Order "that the Secretary of State and the Secretary of the Interior *shall* from time to time jointly recommend the establishment by Executive orders of fishery conservation zones in areas of the high seas contiguous to the coasts of the United States," a command which has been consistently ignored.

These recitals disclose a willingness and intention on the part of our Government, *at that time*, to take unilateral action, if necessary, to accomplish a practical result. If the Department should grasp the opportunity to solve the acute Pacific Ocean fishery problem in connection with the negotiation of a peace treaty with Japan, the necessity for unilateral action might be happily avoided, but it would be a misfortune for our own Government now to abnegate a power which it so boldly announced by the Proclamation of 1945, resort to which may be essential to the protection of our national interests.

EDWARD W. ALLEN

Seattle, Washington

ANNUAL MEETING OF THE SOCIETY

The Forty-Fifth Annual Meeting of the American Society of International Law will be held at the Washington Hotel in Washington, D. C., from April 26 to 28, 1951. An interesting program of subjects and speakers is being arranged by the Committee on Annual Meeting under the chairmanship of Professor John W. Brewer.

As already noted above, the business session of the Society on Saturday, April 28, will be devoted primarily to completing its organization as a corporation in accordance with the Act of Congress approved last September. The annual banquet on Saturday evening will conclude the sessions.

Advance programs and reservation cards for the dinner will be sent to the members of the Society early in April.

E. H. F.

JUDICIAL DECISIONS

BY WILLIAM W. BISHOP, JR.

Of the Board of Editors

[With the assistance of Mr. Donald S. Leeper, made possible by the W. W. Cook Legal Research Endowment of the University of Michigan Law School.]

ASYLUM CASE (COLOMBIA/PERU). I.C.J. Reports, 1950, p. 266.¹
International Court of Justice, November 20, 1950.

Diplomatic asylum.—Right of qualification of the nature of the offence as political or ordinary; claim to unilateral and definitive qualification by the State granting asylum.—Lack of foundation of such a claim in the absence of agreement or of a customary rule to justify it.—*Bolivarian Agreement of 1911 on Extradition*; differences between territorial asylum (extradition) and diplomatic asylum.—*The Havana Convention on Asylum of 1928*, the *Montevideo Convention on Political Asylum of 1933*; custom, elements and proof of custom.—Guarantees for the free departure of the refugee; conditions required for the request for a safe-conduct.

Counter-claim.—*Admissibility*: direct connexion with the subject-matter of the Application (Article 63 of the Rules of Court).—*Merits*: interpretation of Article I, paragraph I, of the *Havana Convention*; interpretation of Article 2, paragraph 2, of the same Convention: notion of urgency, nature of the danger the imminence of which constitutes urgency, legal proceedings instituted by the territorial authorities prior to the grant of asylum, regular proceedings, proceedings manifestly of an arbitrary character; absence of urgency at the time of the grant of asylum; protection maintained against regular proceedings; prolongation of asylum contrary to Article 2, paragraph 2, of the *Havana Convention*.

[Colombia and Peru submitted this case to the Court by an agreement of August 31, 1949, known as the "Act of Lima."]

On October 3rd, 1948, a military rebellion broke out in Peru. It was suppressed on the same day and investigations were at once opened.

On October 4th, the President of the Republic issued a decree in the recitals of which a political party, the American People's Revolutionary Alliance, was charged with having organized and directed the rebellion. The decree consequently enacted that this party had placed itself outside the law, that it would henceforth not be permitted to exercise any kind of activity, and that its leaders would be brought to justice in the national courts as instigators of the rebellion. Simultaneously, the head of the Judicial Department of the Navy issued an order requiring the Examining Magistrate to open at once an enquiry as to the facts constituting the crime of military rebellion.

On October 5th, the Minister of the Interior addressed to the Minister for the Navy a "note of denunciation" against the leader of the American

¹ Excerpted text of judgment.

People's Revolutionary Alliance, Víctor Raúl Haya de la Torre, and other members of the party as responsible for the rebellion. This denunciation was approved on the same day by the Minister for the Navy and October 10th by the Public Prosecutor, who stated that the subject-matter of the proceedings was the crime of military rebellion.

On October 11th, the Examining Magistrate issued an order for the opening of judicial proceedings against Haya de la Torre and others "in respect of the crime of military rebellion with which they are charged in the 'denunciation,'" and on October 25th he ordered the arrest of the persons "denounced" who had not yet been detained.

On October 27th, a Military Junta made a *coup d'état* and seized the supreme power. This Military Junta of the Government issued on November 4th a decree providing for Courts-Martial for summary procedure in cases of rebellion, sedition and rioting, fixing short time-limits and severe punishment without appeal.

This decree was not applied to the judicial proceedings against Haya de la Torre and others. These proceedings continued under the same jurisdiction as theretofore. This is shown by a note of November 8th from the Examining Magistrate requesting the production of certain documents, by a note of November 13th from the Head of the Investigation and Surveillance Service to the Examining Magistrate stating that Haya de la Torre and others were not arrested as they could not be found, and by an Order by the Examining Magistrate of the same date requiring the defaulters to be cited by public summons. On November 16th and the two subsequent days, the summons was published in the official gazette *El Peruano*, requiring "the accused persons who are in default"—Haya de la Torre and others—to report to the office of the Examining Magistrate to answer the accusation brought against them "for the crime of military rebellion." Haya de la Torre did not report, and the facts brought to the knowledge of the Court do not show that any further measures were taken against him.

On October 4th, the day after the military rebellion, a state of siege was declared, suspending certain constitutional rights; it was renewed on November 2nd and December 2nd, 1948, and on January 2nd, 1949.

On January 3rd, 1949, Haya de la Torre sought asylum in the Colombian Embassy in Lima. On the next day, the Colombian Ambassador sent the following note to the Peruvian Minister for Foreign Affairs and Public Worship:

"I have the honour to inform Your Excellency, in accordance with what is provided in Article 2, paragraph 2, of the Convention on Asylum signed by our two countries in the city of Havana in the year 1928, that Señor Víctor Raúl Haya de la Torre has been given asylum at the seat of this mission as from 9 p.m. yesterday.

In view of the foregoing, and in view of the desire of this Embassy that Senor Haya de la Torre should leave Peru as early as possible, I

request Your Excellency to be good enough to give orders for the requisite safe-conduct to be issued, so that Senor Haya de la Torre may leave the country with the usual facilities attaching to the right of diplomatic asylum."

On January 14th, the Ambassador sent to the Minister a further note as follows:

"Pursuant to instructions received from the Chancellery of my country, I have the honour to inform Your Excellency that the Government of Colombia, in accordance with the right conferred upon it by Article 2 of the Convention on Political Asylum signed by our two countries in the city of Montevideo on December 26th, 1933, has qualified Señor Víctor Raúl Haya de la Torre as a political refugee."

A diplomatic correspondence followed, leading up to the Act of Lima of August 31st, 1949, whereby the dispute which had arisen between the two Governments was referred to the Court.

The Colombian Government has presented two submissions, of which the first asks the Court to adjudge and declare

"That the Republic of Colombia, as the country granting asylum, is competent to qualify the offence for the purpose of said asylum, within the limits of the obligations resulting in particular from the Bolivarian Agreement on Extradition of July 18th, 1911,¹ and the Convention on Asylum of February 20th, 1928,² and of American international law in general."

If the Colombian Government by this submission intended to allege that Colombia, as the State granting asylum, is competent to qualify the offence only provisionally and without binding effect for Peru, the solution would not remain a matter of doubt. It is evident that the diplomatic representative who has to determine whether a refugee is to be granted asylum or not must have the competence to make such a provisional qualification of any offence alleged to have been committed by the refugee. He must in fact examine the question whether the conditions required for granting asylum are fulfilled. The territorial State would not thereby be deprived of its right to contest the qualification. In case of disagreement between the two States, a dispute would arise which might be settled by the methods provided by the Parties for the settlement of their disputes.

This is not, however, the meaning which the Colombian Government has put on its submission. It has not claimed the right of qualification for the sole purpose of determining its own conduct. The written and oral arguments submitted on behalf of that Government show that its claim must be understood in the sense that Colombia, as the State granting asylum, is competent to qualify the nature of the offence by a unilateral and de-

¹ See this JOURNAL, Supp., Vol. 29 (1935), p. 282.

² See this JOURNAL, Supp., Vol. 22 (1928), p. 158.

definitive decision binding on Peru. Colombia has based this submission partly on rules resulting from agreement, partly on an alleged custom.

The Colombian Government has referred to the Bolivarian Agreement of 1911, Article 18, which is framed in the following terms:

“Aside from the stipulations of the present Agreement, the signatory States recognize the institution of asylum in conformity with the principles of international law.”

In recognizing “the institution of asylum,” this article merely refers to the principles of international law. But the principles of international law do not recognize any rule of unilateral and definitive qualification by the State granting diplomatic asylum.

The Colombian Government has also relied on Article 4 of this Agreement concerning extradition of a criminal refugee from the territory of the State in which he has sought refuge. The arguments submitted in this respect reveal a confusion between territorial asylum (extradition), on the one hand, and diplomatic asylum, on the other.

In the case of extradition, the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State.

In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.

For these reasons, it is not possible to deduce from the provisions of agreements concerning extradition any conclusion which would apply to the question now under consideration.

The Colombian Government further relies on the Havana Convention on Asylum of 1928. This Convention lays down certain rules relating to diplomatic asylum, but does not contain any provision conferring on the State granting asylum a unilateral competence to qualify the offence with definitive and binding force for the territorial State. The Colombian Government contends, however, that such a competence is implied in that Convention and is inherent in the institution of asylum.

A competence of this kind is of an exceptional character. It involves a derogation from the equal rights of qualification which, in the absence of any contrary rule, must be attributed to each of the States concerned; it thus aggravates the derogation from territorial sovereignty constituted by the exercise of asylum. . . .

These considerations show that the alleged right of unilateral and definitive qualification cannot be regarded as recognized by implication in the Havana Convention. Moreover, this Convention, in pursuance of the desire expressed in its preamble of "fixing the rules" which the Governments of the States of America must observe for the granting of asylum, was concluded with the manifest intention of preventing the abuses which had arisen in the previous practice, by limiting the grant of asylum. It did so in a number of ways and in terms which are unusually restrictive and emphatic ("It is not permissible for States . . ."; "Asylum may not be granted except in urgent cases and for the period of time strictly indispensable . . .," etc.).

The Colombian Government has invoked Article 2, paragraph 1, of the Havana Convention, which is framed in the following terms:

"Asylum granted to political offenders in legations, warships, military camps or military aircraft, shall be respected to the extent in which allowed as a right or through humanitarian toleration, by the usages, the conventions or the laws of the country in which granted and in accordance with the following provisions:"

This provision has been interpreted by that Government in the sense that the usages, conventions and laws of Colombia relating to the qualification of the offence can be invoked against Peru. This interpretation, which would mean that the extent of the obligation of one of the signatory States would depend upon any modifications which might occur in the law of another, cannot be accepted. The provision must be regarded as a limitation of the extent to which asylum shall be respected. What the provision says in effect is that the State of refuge shall not exercise asylum to a larger extent than is warranted by its own usages, conventions or laws and that the asylum granted must be respected by the territorial State only where such asylum would be permitted according to the usages, conventions or laws of the State of refuge. Nothing therefore can be deduced from this provision in so far as qualification is concerned.

The Colombian Government has further referred to the Montevideo Convention on Political Asylum of 1933. It was in fact this Convention which was invoked in the note of January 14th, 1949, from the Colombian Ambassador to the Peruvian Minister for Foreign Affairs. It is argued that, by Article 2 of that Convention, the Havana Convention of 1928 is interpreted in the sense that the qualification of a political offence appertains to the State granting asylum. Articles 6 and 7 of the Montevideo Convention provide that it shall be ratified and will enter into force as and when the ratifications are deposited. The Montevideo Convention has not been ratified by Peru, and cannot be invoked against that State. The fact that it was considered necessary to incorporate in that Convention an article, accepting the right of unilateral qualification, seems to indicate that this solution was regarded as a new rule not recognized by the Havana Conven-

tion. Moreover, the preamble of the Montevideo Convention states in its Spanish, French and Portuguese texts that it modifies the Havana Convention. It cannot therefore be considered as representing merely an interpretation of that Convention.

The Colombian Government has finally invoked "American international law in general." In addition to the rules arising from agreements which have already been considered, it has relied on an alleged regional or local custom peculiar to Latin-American States.

The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law."

In support of its contention concerning the existence of such a custom, the Colombian Government has referred to a large number of extradition treaties which, as already explained, can have no bearing on the question now under consideration. It has cited conventions and agreements which do not contain any provision concerning the alleged rule of unilateral and definitive qualification such as the Montevideo Convention of 1889 on international penal law, the Bolivarian Agreement of 1911 and the Havana Convention of 1928. It has invoked conventions which have not been ratified by Peru, such as the Montevideo Conventions of 1933¹ and 1939.² The Convention of 1933 has, in fact, been ratified by not more than eleven States and the Convention of 1939 by two States only.

It is particularly the Montevideo Convention of 1933 which Counsel for the Colombian Government has also relied on in this connection. It is contended that this Convention has merely codified principles which were already recognized by Latin-American custom, and that it is valid against Peru as a proof of customary law. The limited number of States which have ratified this Convention reveals the weakness of this argument, and furthermore, it is invalidated by the preamble which states that this Convention modifies the Havana Convention.

Finally, the Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule of unilateral and definitive qualification was invoked or—if in some cases it was in fact invoked—that it was, apart from conventional stipulations, exercised by the States granting asylum as a right appertaining to them and respected by the ter-

¹ This JOURNAL, Supp., Vol. 28 (1934), p. 70.

² This JOURNAL, Supp., Vol. 37 (1943), p. 99.

ritorial States as a duty incumbent on them and not merely for reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.

The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.

In the written Pleadings and during the oral proceedings, the Government of Colombia relied upon official communiqués published by the Peruvian Ministry of Foreign Affairs on October 13th and 26th, 1948, and the Government of Peru relied upon a Report of the Advisory Committee of the Ministry of Foreign Affairs of Colombia dated September 2nd, 1937; on the question of qualification, these documents state views which are contrary to those now maintained by these Governments. The Court, whose duty it is to apply international law in deciding the present case, cannot attach decisive importance to any of these documents.

For these reasons, the Court has arrived at the conclusion that Colombia, as the State granting asylum, is not competent to qualify the offence by a unilateral and definitive decision, binding on Peru.

In its second submission, the Colombian Government asks the Court to adjudge and declare:

“That the Republic of Peru, as the territorial State, is bound in the case now before the Court, to give the guarantees necessary for the departure of M. Víctor Raúl Haya de la Torre from the country, with due regard to the inviolability of his person.”

This alleged obligation of the Peruvian Government does not entirely depend on the answer given to the first Colombian submission relating to the unilateral and definitive qualification of the offence. It follows from the first two articles of the Havana Convention that, even if such a right of qualification is not admitted, the Colombian Government is entitled to request a safe-conduct under certain conditions.

The first condition is that asylum has been regularly granted and maintained. It can be granted only to political offenders who are not accused or condemned for common crimes and only in urgent cases and for the time strictly indispensable for the safety of the refugee. These points relate to the Peruvian counter-claim and will be considered later to the extent necessary for the decision of the present case.

The second condition is laid down in Article 2 of the Havana Convention :

“Third: The Government of the State may require that the refugee be sent out of the national territory within the shortest time possible; and the diplomatic agent of the country who has granted asylum may in turn require the guarantees necessary for the departure of the refugee from the country with due regard to the inviolability of his person.”

If regard is had, on the one hand, to the structure of this provision which indicates a successive order, and, on the other hand, to the natural and ordinary meaning of the words “in turn,” this provision can only mean that the territorial State may require that the refugee be sent out of the country, and that only after such a demand can the State granting asylum require the necessary guarantees as a condition of his being sent out. The provision gives, in other words, the territorial State an option to require the departure of the refugee, and that State becomes bound to grant a safe-conduct only if it has exercised this option.

A contrary interpretation would lead, in the case now before the Court, to the conclusion that Colombia would be entitled to decide alone whether the conditions provided by Articles 1 and 2 of the Convention for the regularity of asylum are fulfilled. Such a consequence obviously would be incompatible with the legal situation created by the Convention.

There exists undoubtedly a practice whereby the diplomatic representative who grants asylum immediately requests a safe-conduct without awaiting a request from the territorial State for the departure of the refugee. This procedure meets certain requirements: the diplomatic agent is naturally desirous that the presence of the refugee on his premises should not be prolonged; and the government of the country, for its part, desires in a great number of cases that its political opponent who has obtained asylum should depart. This concordance of views suffices to explain the practice which has been noted in this connexion, but this practice does not and cannot mean that the State, to whom such a request for a safe-conduct has been addressed, is legally bound to accede to it.

In the present case, the Peruvian Government has not requested that Haya de la Torre should leave Peru. It has contested the legality of the asylum granted to him and has refused to deliver a safe-conduct. In such circumstances the Colombian Government is not entitled to claim that the Peruvian Government should give the guarantees necessary for the

departure of Haya de la Torre from the country, with due regard to the inviolability of his person.

The counter-claim of the Government of Peru was stated in its final form during the oral statement of October 3rd, 1950, in the following terms:

“May It Please the Court:

To adjudge and declare as a counter-claim under Article 63 of the Rules of Court, and in the same decision, that the grant of asylum by the Colombian Ambassador at Lima to Víctor Raúl Haya de la Torre was made in violation of Article I, paragraph I, and Article 2, Paragraph 2, item 1 (inciso primero), of the Convention on Asylum signed in 1928, and that in any case the maintenance of the asylum constitutes at the present time a violation of that treaty.”

As has already been pointed out, the last part of this sentence: “and that in any case the maintenance of the asylum constitutes at the present time a violation of that treaty,” did not appear in the counter-claim presented by the Government of Peru in the Counter-Memorial. The addition was only made during the oral proceedings. The Court will first consider the counter-claim in its original form.

This counter-claim is intended, in substance, to put an end to the dispute by requesting the Court to declare that asylum was wrongfully given, the grant of asylum being contrary to certain provisions of the Havana Convention. The object of the counter-claim is simply to define for this purpose the legal relations which that Convention has established between Colombia and Peru. The Court observes in this connexion that the question of the possible surrender of the refugee to the territorial authorities is in no way raised in the counter-claim. It points out that the Havana Convention, which provides for the surrender to those authorities of persons accused of or condemned for common crimes, contains no similar provision in respect of political offenders. The Court notes, finally, that this question was not raised either in the diplomatic correspondence submitted by the Parties or at any moment in the proceedings before the Court, and in fact the Government of Peru has not requested that the refugee should be surrendered.

It results from the final submissions of the Government of Colombia, as formulated before the Court on October 6th, 1950, that that Government did not contest the jurisdiction of the Court in respect of the original counter-claim; it did so only in respect of the addition made during the oral proceedings. On the other hand, relying upon Article 63 of the Rules of Court, the Government of Colombia has disputed the admissibility of the counter-claim by arguing that it is not directly connected with the subject-matter of the Application. In its view, this lack of connexion results from the fact that the counter-claim raises new problems and thus tends to shift the grounds of the dispute.

The Court is unable to accept this view. It emerges clearly from the

arguments of the Parties that the second submission of the Government of Colombia, which concerns the demand for a safe-conduct, rests largely on the alleged regularity of the asylum, which is precisely what is disputed by the counter-claim. The connexion is so direct that certain conditions which are required to exist before a safe-conduct can be demanded depend precisely on facts which are raised by the counter-claim. The direct connexion being thus clearly established, the sole objection to the admissibility of the counter-claim in its original form is therefore removed.

Before examining the question whether the counter-claim is well founded, the Court must state in precise terms what meaning it attaches to the words "the grant of asylum" which are used therein. The grant of asylum is not an instantaneous act which terminates with the admission, at a given moment, of a refugee to an embassy or a legation. Any grant of asylum results in, and in consequence logically implies, a state of protection; the asylum is granted as long as the continued presence of the refugee in the embassy prolongs this protection. This view, which results from the very nature of the institution of asylum, is further confirmed by the attitude of the Parties during this case. The counter-claim, as it appears in the Counter-Memorial of the Government of Peru, refers expressly to Article 2, paragraph 2, of the Havana Convention, which provides that asylum may not be granted except "for the period of time strictly indispensable." Such has also been the view of the Government of Colombia; its Reply shows that, in its opinion, as in that of the Government of Peru, the reference to the above-mentioned provision of the Havana Convention raises the question of "duration of the refuge."

The Government of Peru has based its counter-claim on two different grounds which correspond respectively to Article I, paragraph I, and Article 2, paragraph 2, of the Havana Convention.

Under Article I, paragraph I, "It is not permissible for States to grant asylum . . . to persons accused or condemned for common crimes. . . ." The onus of proving that Haya de la Torre had been accused or condemned for common crimes before the grant of asylum rested upon Peru.

The Court has no difficulty in finding, in the present case, that the refugee was an "accused person" within the meaning of the Havana Convention, inasmuch as the evidence presented by the Government of Peru appears conclusive in this connexion. It can hardly be agreed that the term "accused" occurring in a multilateral treaty such as that of Havana has a precise and technical connotation, which would have the effect of subordinating the definition of "accused" to the completion of certain strictly prescribed steps in procedure, which might differ from one legal system to another.

On the other hand, the Court considers that the Government of Peru has not proved that the acts of which the refugee was accused before January 3rd/4th, 1949, constitute common crimes. From the point of

view of the application of the Havana Convention, it is the terms of the accusation, as formulated by the legal authorities before the grant of asylum, that must alone be considered. As has been shown in the recital of the facts, the sole accusation contained in all the documents emanating from the Peruvian legal authorities is that of military rebellion, and the Government of Peru has not established that military rebellion in itself constitutes a common crime. Article 248 of the Peruvian Code of Military Justice of 1939 even tends to prove the contrary, for it makes a distinction between military rebellion and common crimes by providing that: "Common crimes committed during the course of, and in connexion with, a rebellion, shall be punishable in conformity with the laws, irrespective of the rebellion."

These considerations lead to the conclusion that the first objection made by the Government of Peru against the asylum is not justified and that on this point the counter-claim is not well founded and must be dismissed.

The Government of Peru relies, as a second basis for its counter-claim, upon the alleged disregard of Article 2, paragraph 2, of the Havana Convention, which provides as follows: "Asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety."

Before proceeding to an examination of this provision, the Court considers it necessary to make the following remark concerning the Havana Convention in general and Article 2 in particular.

The object of the Havana Convention, which is the only agreement relevant to the present case, was, as indicated in its preamble, to fix the rules which the signatory States must observe for the granting of asylum in their mutual relations. The intention was, as has been stated above, to put an end to the abuses which had arisen in the practice of asylum and which were likely to impair its credit and usefulness. This is borne out by the wording of Articles I and 2 of the Convention which is at times prohibitive and at times clearly restrictive.

Article 2 refers to asylum granted to political offenders and lays down in precise terms the conditions under which asylum granted to such offenders shall be respected by the territorial State. It is worthy of note that all these conditions are designed to give guarantees to the territorial State and appear, in the final analysis, as the consideration for the obligation which that State assumes to respect asylum, that is, to accept its principle and its consequences as long as it is regularly maintained.

At the head of the list of these conditions appears Article 2, paragraph 2, quoted above. It is certainly the most important of them, the essential justification for asylum being in the imminence or persistence of a danger for the person of the refugee. It was incumbent upon the Government of Colombia to submit proof of facts to show that the above-mentioned condition was fulfilled.

It has not been disputed by the Parties that asylum may be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population. It has not been contended by the Government of Colombia that Haya de la Torre was in such a situation at the time when he sought refuge in the Colombian Embassy at Lima. At that time, three months had elapsed since the military rebellion. This long interval gives the present case a very special character. During those three months, Haya de la Torre had apparently been in hiding in the country, refusing to obey the summons to appear of the legal authorities which was published on November 16th/18th, 1948, and refraining from seeking asylum in the foreign embassies where several of his co-accused had found refuge before these dates. It was only on January 3rd, 1949, that he sought refuge in the Colombian Embassy. The Court considers that, *prima facie*, such circumstances make it difficult to speak of urgency.

The diplomatic correspondence between the two Governments does not indicate the nature of the danger which was alleged to threaten the refugee. Likewise, the Memorial of the Government of Colombia confines itself to stating that the refugee begged the Ambassador to grant him the diplomatic protection of asylum as his freedom and life were in jeopardy. It is only in the written Reply that the Government of Colombia described in more precise terms the nature of the danger against which the refugee intended to request the protection of the Ambassador. It was then claimed that this danger resulted in particular from the abnormal political situation existing in Peru, following the state of siege proclaimed on October 4th, 1948, and renewed successively on November 2nd, December 2nd, 1948, and January 2nd, 1949; that it further resulted from the declaration of "a state of national crisis" made on October 25th, 1948, containing various statements against the American People's Revolutionary Alliance of which the refugee was the head; from the outlawing of this Party by the decree of October 4th, 1948; from the Order issued by the acting Examining Magistrate for the Navy on November 13th, 1948, requiring the defaulters to be cited by public summons; from the decree of November 4th, 1948, providing for Courts-Martial to judge summarily, with the option of increasing the penalties and without appeal, the authors, accomplices and others responsible for the offences of rebellion, sedition or mutiny.

From these facts regarded as a whole the nature of the danger now becomes clear, and it is upon the urgent character of such a danger that the Government of Colombia seeks to justify the asylum—the danger of political justice by reason of the subordination of the Peruvian judicial authorities to the instructions of the Executive.

It is therefore necessary to examine whether, and, if so, to what extent, a danger of this kind can serve as a basis for asylum.

In principle, it is inconceivable that the Havana Convention could have intended the term "urgent cases" to include the danger of regular prosecution to which the citizens of any country lay themselves open by attacking the institutions of that country; nor can it be admitted that in referring to "the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety," the Convention envisaged protection from the operation of regular legal proceedings.

It would be useless to seek an argument to the contrary in Article I of the Havana Convention which forbids the grant of asylum to persons "accused or condemned for common crimes" and directs that such persons shall be surrendered immediately upon request of the local government. It is not possible to infer from that provision that, because a person is accused of political offences and not of common crimes, he is, by that fact alone, entitled to asylum. It is clear that such an inference would disregard the requirements laid down by Article 2, paragraph 2, for the grant of asylum to political offenders.

In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents. The word "safety," which in Article 2, paragraph 2, determines the specific effect of asylum granted to political offenders, means that the refugee is protected against arbitrary action by the government, and that he enjoys the benefits of the law. On the other hand, the safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals. Protection thus understood would authorize the diplomatic agent to obstruct the application of the laws of the country whereas it is his duty to respect them; it would in fact become the equivalent of an immunity, which was evidently not within the intentions of the draftsmen of the Havana Convention.

It is true that successive decrees promulgated by the Government of Peru proclaimed and prolonged a state of siege in that country; but it has not been shown that the existence of a state of siege implied the subordination of justice to the executive authority, or that the suspension of certain constitutional guarantees entailed the abolition of judicial guarantees. As for the decree of November 4th, 1948, providing for Courts-Martial, it contained no indication which might be taken to mean that the new provisions would apply retroactively to offences committed prior to the publication of the said decree. In fact, this decree was not applied to the legal

proceedings against Haya de la Torre, as appears from the foregoing recital of the facts. As regards the future, the Court places on record the following declaration made on behalf of the Peruvian Government:

"The decree in question is dated November 4th, 1948, that is, it was enacted one month after the events which led to the institution of proceedings against Haya de la Torre. This decree was intended to apply to crimes occurring after its publication, and nobody in Peru would ever have dreamed of utilizing it in the case to which the Colombian Government clumsily refers, since the principle that laws have no retroactive effect, especially in penal matters, is broadly admitted in that decree. If the Colombian Government's statement on this point were true, the Peruvian Government would never have referred this case to the International Court of Justice."

This declaration, which appears in the Rejoinder, was confirmed by the Agent for the Government of Peru in his oral statement of October 2nd, 1950.

The Court cannot admit that the States signatory to the Havana Convention intended to substitute for the practice of the Latin-American republics, in which considerations of courtesy, good-neighbourliness and political expediency have always held a prominent place, a legal system which would guarantee to their own nationals accused of political offences the privilege of evading national jurisdiction. Such a conception, moreover, would come into conflict with one of the most firmly established traditions of Latin America, namely, non-intervention. It was at the Sixth Pan-American Conference of 1928, during which the Convention on Asylum was signed, that the States of Latin America declared their resolute opposition to any foreign political intervention. It would be difficult to conceive that these same States had consented, at the very same moment, to submit to intervention in its least acceptable form, one which implies foreign interference in the administration of domestic justice and which could not manifest itself without casting some doubt on the impartiality of that justice.

Indeed the diplomatic correspondence between the two Governments shows the constant anxiety of Colombia to remain, in this field as elsewhere, faithful to the tradition of non-intervention. Colombia did not depart from this attitude, even when she found herself confronted with an emphatic declaration by the Peruvian Minister for Foreign Affairs asserting that the tribunal before which Haya de la Torre had been summoned to appear was in conformity with the general and permanent organization of Peruvian judicial administration and under the control of the Supreme Court. This assertion met with no contradiction or reservation on the part of Colombia. It was only much later, following the presentation of the Peruvian counter-claim, that the Government of Colombia chose, in the Reply and during the oral proceedings, to transfer the defence of asylum to a plane on which the Havana Convention, interpreted in the light of the

most firmly established traditions of Latin-America, could provide it with no foundation.

The foregoing considerations lead us to reject the argument that the Havana Convention was intended to afford a quite general protection of asylum to any person prosecuted for political offences, either in the course of revolutionary events, or in the more or less troubled times that follow, for the sole reason that it must be assumed that such events interfere with the administration of justice. It is clear that the adoption of such a criterion would lead to foreign interference of a particularly offensive nature in the domestic affairs of States; besides which, no confirmation of this criterion can be found in Latin-American practice, as this practice has been explained to the Court.

In thus expressing itself, the Court does not lose sight of the numerous cases of asylum which have been cited in the Reply of the Government of Colombia and during the oral statements. In this connexion, the following observations should be made:

In the absence of precise data, it is difficult to assess the value of such cases as precedents tending to establish the existence of a legal obligation upon a territorial State to recognize the validity of asylum which has been granted against proceedings instituted by local judicial authorities. . . . In a more general way, considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation.

If these remarks tend to reduce considerably the value as precedents of the cases of asylum cited by the Government of Colombia, they show, none the less, that asylum as practised in Latin America is an institution which, to a very great extent, owes its development to extra-legal factors. The good-neighbour relations between the republics, the different political interests of the governments, have favoured the mutual recognition of asylum apart from any clearly defined juridical system. Even if the Havana Convention, in particular, represents an indisputable reaction against certain abuses in practice, it in no way tends to limit the practice of asylum as it may arise from agreements between interested governments inspired by mutual feelings of toleration and goodwill.

In conclusion, on the basis of the foregoing observations and considerations, the Court considers that on January 3rd/4th, 1949, there did not exist a danger constituting a case of urgency within the meaning of Article 2, paragraph 2, of the Havana Convention.

This finding implies no criticism of the Ambassador of Colombia. His decision to receive the refugee on the evening of January 3rd, 1949, may have been taken without the opportunity of lengthy reflection; it may have been influenced as much by the previous grant of safe-conducts to persons accused together with Haya de la Torre as by the more general considera-

tion of recent events in Peru; these events may have led him to believe in the existence of urgency. But this subjective appreciation is not the relevant element in the decision which the Court is called upon to take concerning the validity of the asylum; the only important question to be considered here is the objective existence of the facts, and it is this which must determine the decision of the Court.

The notes of the Ambassador of Colombia of January 14th and February 12th, 1949, reflect the attitude of the Government towards the asylum granted by its Ambassador. The first of these confirms the asylum and claims to justify its grant by a unilateral qualification of the refugee. The second formulates a demand for a safe-conduct with a view to permitting the departure of the refugee, and has based this demand expressly on the "international obligations" alleged to be binding on the Government of Peru. In thus expressing itself, the Government of Colombia definitively proclaimed its intention of protecting Haya de la Torre, in spite of the existence of proceedings instituted against him for military rebellion. It has maintained this attitude and this protection by continuing to insist on the grant of a safe-conduct, even when the Minister for Foreign Affairs of Peru referred to the existence of "a judicial prosecution, instituted by the sovereign power of the State" against the refugee (notes of the Minister for Foreign Affairs of Peru of March 19th, 1949; of the Ambassador of Colombia of March 28th, 1949).

Thus, it is clearly apparent from this correspondence that the Court, in its appraisal of the asylum, cannot be confined to the date of January 3rd/4th, 1949, as the date on which it was granted. The grant, as has been stated above, is inseparable from the protection to which it gives rise—a protection which has here assumed the form of a defence against legal proceedings. It therefore results that asylum has been granted for as long as the Government of Colombia has relied upon it in support of its request for a safe-conduct.

The Court is thus led to find that the grant of asylum from January 3rd/4th, 1949, until the time when the two Governments agreed to submit the dispute to its jurisdiction, has been prolonged for a reason which is not recognized by Article 2, paragraph 2, of the Havana Convention.

This finding renders superfluous the addition to the counter-claim submitted during the oral proceedings and worded as follows: "and that in any case the maintenance of the asylum constitutes at the present time a violation of that treaty." This part of the submission, as finally worded by the Government of Peru, was intended as a substitution for the counter-claim in its original form if the latter were rejected: it disappears with the allowance of this counter-claim. Hence it will not be necessary for the Court to consider either the objection on the ground of lack of jurisdiction or the objections on the grounds of inadmissibility which the Government of Colombia has based on an alleged disregard of Article 63 of the Rules of

Court or to consider the merits of the claim thus submitted by the Government of Peru.

For these Reasons, The Court, on the submissions of the Government of Colombia, by fourteen votes to two, rejects the first submission in so far as it involves a right for Colombia, as the country granting asylum, to qualify the nature of the offence by a unilateral and definitive decision, binding on Peru; by fifteen votes to one, rejects the second submission; on the counter-claim of the Government of Peru, by fifteen votes to one, rejects it in so far as it is founded on a violation of Article I, paragraph I, of the Convention on Asylum signed at Havana in 1928; by ten votes to six, finds that the grant of asylum by the Colombian Government to Víctor Raúl Haya de la Torre was not made in conformity with Article 2, paragraph 2 ("First"), of that Convention.*

* Judges Alvarez, Badawi Pasha, Read and Azevedo, and Judge *ad hoc* Caicedo, delivered dissenting opinions, not printed here. Judge Zoričić accepted the first three points of the Judgment and the reasons in support thereof, but disagreed with the last point; he thought asylum was granted in conformity with Article 2, paragraph 2, of the Havana Convention, and shared Judge Read's views on this point.

On the day of the Judgment, Colombia requested an interpretation of the Judgment, under Article 60 of the Statute of the International Court of Justice, inquiring whether the Judgment (1) must be interpreted in the sense that the qualification of the offense as political, made by the Colombian Ambassador, was correct; (2) must be interpreted to mean that Peru is not entitled to demand surrender of the refugee and that Colombia is not bound to surrender him if requested; and (3) implies that Colombia is bound to surrender the refugee to the Peruvian authorities, "even if the latter do not so demand, in spite of the fact that he is a political offender and not a common criminal, and that the only convention applicable to the present case does not order the surrender of political offenders."

On November 27, 1950, the Court, by a vote of twelve to one (Judge *ad hoc* Caicedo dissenting), held the request by Colombia for interpretation to be inadmissible. The Court found that the first point was not raised in the submissions of Colombia leading to the Judgment; on the second and third points it said that the question of surrender of the refugee to the Peruvian Government "was completely left outside the submissions of the Parties. The Judgment in no way decided it, nor could it do so. It was for the Parties to present their respective claims on this point. The Court finds that they did nothing of the kind." It stated that "the real purpose" of the request must be to obtain an interpretation, and not to obtain an answer to questions not decided; in addition, "it is necessary that there should exist a dispute as to the meaning or scope of the Judgment." Here the Court found that: "The 'gaps' which the Colombian Government claims to have discovered in the Court's Judgment in reality are new questions, which cannot be decided by means of interpretation." It added that, "In reality, the object of the questions submitted by the Colombian Government is to obtain, by the indirect means of interpretation, a decision on questions which the Court was not called upon by the Parties to answer." Nor was there here any "dispute as to meaning or scope of the Judgment," since a "dispute requires a divergence of views between the parties on definite points." (Judgment of November 27th, 1950, I.C.J. Reports, 1950, p. 395.) In a new action in this case brought by Colombia against Peru on Dec. 13, 1950, the International Court of Justice issued an order on Jan. 3, 1951, fixing the time-limits for filing of pleadings by the parties as Feb. 7, 1951, for the Government of Colombia, and March 15, 1951, for the Government of Peru.

*Recognition—retroactive effect—nationalization decrees and debts*UNITED STATES *v.* NATIONAL CITY BANK OF N. Y. 90 F. Supp. 448.

U. S. District Court, S. D. N. Y., May 5, 1950. Rifkind, D. J.

Relying on the Litvinov Assignment of 1933 by the Soviet Government, the United States in 1947 brought an action against defendant bank, as assignee of a bank account therein, for the balance on this account originally deposited by the Russo-Asiatic Bank, a pre-Soviet Russian corporation. Long prior to United States recognition of the Soviet Government, the latter had nationalized Russo-Asiatic Bank and transferred to itself the assets of that bank. The court stated that in view of *United States v. Pink*¹ and *Steingut v. Guaranty Trust Co.*,² the United States would be entitled to judgment, except for the fact that National City Bank was entitled to offset a larger amount owed to it on Russian Treasury notes issued in 1917 by the Provisional Government of Russia, duly recognized by the United States. These notes were made in Washington and payable in dollars at National City Bank in New York. The unrecognized Soviet Government repudiated these notes by a decree of January 21, 1918, but thereafter the still recognized Provisional Government had extended their maturity to Nov. 1, 1919, when they were defaulted. The court said:

I begin with the acceptance of the plaintiff's major premise: that by virtue of the recognition of the Soviet regime in 1933, the validity of the Soviet banking decrees must be retroactively acknowledged. . . . It follows that on December 27, 1917, Soviet Russia became the owner of the Russo-Asiatic account at National City Bank. . . . The position of Soviet Russia, on this premise, was the same as if it were the assignee of the Russo-Asiatic account. Thenceforth, National City Bank could treat Soviet Russia as a depositor who had to its credit \$2,261,981.72. It necessarily follows that the credit balance became available for set-off against Soviet debts to National City Bank, in those instances in which the equitable doctrine of set-off obtains.

. . . Again accepting the premise that retroactive effect must be given to recognition, it must be acknowledged that on November 7, 1917, the date of the revolution, Soviet Russia became the obligor on Russia's Treasury Notes. Another way of saying it is that the State of Russia was the obligor on the Notes before the revolution and that the State of Russia continued as the obligor after the revolution. The regime in power changed. The state, as a continuing personality, persisted. . . . That the Soviet Government so understood its obligations is implicit in the decree of repudiation made on January 21, 1918. There would have been no occasion for repudiation were there no obligation.

On November 1, 1919, the Notes fell due. They were payable at National City Bank. They were, therefore, the equivalent of orders "to the bank to pay the same for the account of the principal debtor thereon." N. Y. Negotiable Instruments Law. . . . That order Na-

¹ 315 U. S. 203; this JOURNAL, Vol. 36 (1942), p. 309. . .

² 58 F. Supp. 623 (S. D. N. Y. 1944), aff'd 161 F. (2d) 571 (C. C. A. 2d, 1947), cert. den., 332 U. S. 807 (1947).

tional City Bank could execute unless the act of repudiation prevented it. . . .

. . . The impact of repudiation by a sovereign within its own territory is governed by the law which prevails in that territory. But obligations created here and here performable are governed by local law. . . . Repudiation by a foreign sovereign of obligations subject to our domestic law is effective only to the extent that its sovereign immunity shields it from suit. Wherever the shield of sovereign immunity is not available there is nothing to prevent our domestic law from taking its course. Here, if the set-off is appropriate, immunity is not available. . . .

Does the allowance of this set-off conflict with the national policy as expressed in the Litvinov Assignment? I think it does not. . . . The United States took Russia's claims subject to their infirmities. No conflict with national policy is generated by acknowledging and giving effect to an infirmity when it is discovered.

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It is, of course, painfully clear that to reach the conclusion that the defense should be sustained I have traversed a bridge built of fictions. "Retroactivity" of Soviet recognition in 1933 commands us to treat the Russian decrees of 1917 *as if* the United States had recognized the Soviet Government on the day of the revolution. That fiction prevails until it collides with another, that the accredited agents of the Provisional Government must, at least in some respects, be treated *as if* there were a government whom they represented. Despite the cataclysmic character of the Bolshevik revolution, we must treat the Soviet Government as the uninterrupted extension of the empire of the Czars. These fictions, however, are the tools which the courts have forged for shaping the answers to the kind of questions which this case presents.

The court rejected plaintiff's argument based on the fact that the Notes and the deposit of Russo-Asiatic did not arise out of the same transaction, pointing out that the Soviet Government must be treated as if it became the owner of the Russo-Asiatic account on Dec. 27, 1917. Furthermore, the Notes were made in Washington and were payable in American currency at the National City Bank in New York; hence they were governed by American law rather than by Russian law, and the repudiation need not be given effect in an American court. Under New York law,

When a depositor deposits moneys to his account in a bank, the bank may apply them to discharge his obligations, *payable at the bank*, without inquiring whether the deposit consisted of proceeds of a transaction in some way related to the debt.

Finally, the court said:

Plaintiff's appeal to equitable consideration is based upon the contention that the United States is engaged in marshalling assets in order to create a pool out of which all American creditors of Russia might satisfy their claims pro-rata, whereas defendant . . . is seeking to secure preferential treatment for its own claims.

I need not consider this appeal. Whether the President, by virtue of his authority over our international relations, or the Congress could have modified the rights of Russia's American creditors and debtors for the purpose of making an equal or more equitable distribution to all American creditors, is a question I am not called upon to investigate. The short answer is that neither the President nor the Congress did anything of the sort. The United States simply stepped into Russia's shoes. The complaint . . . states a simple claim at law for the balance standing to the credit of a bank depositor. The Government has chosen to have its claim appraised by such a standard.

United Nations—legal capacity

BALFOUR, GUTHRIE & CO. v. UNITED STATES. 90 F. Supp. 831.

U. S. District Court, N. D. Calif., May 5, 1950. Goodman, D. J.

In 1947 the United Nations through its International Children's Emergency Fund shipped powdered milk from American ports for Greece and Italy on a vessel owned by the United States Government and operated under charter by an American company. When part of the shipment was damaged and another part lost, the United Nations and other shippers whose property suffered similarly joined in a libel in admiralty against the United States and the charterer. Exceptions questioning the capacity of the United Nations to sue, and in particular to sue the United States under the Suits in Admiralty Act (46 U. S. Code § 741), were overruled, the court saying in part:

The International Court of Justice has held that the United Nations is a legal entity separate and distinct from the member States. While it is not a state nor a super-State, it is an international person, clothed by its Members with the competence necessary to discharge its functions.¹

Article 104 of the Charter of the United Nations, 59 Stat. 1053, provides that "the Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes." As a treaty ratified by the United States, the Charter is part of the supreme law of the land. No implemental legislation would be necessary to endow the United Nations with legal capacity in the United States. But the President has removed any possible doubt by designating the United Nations as one of the organizations entitled to enjoy the privileges conferred by the International Organizations Immunities Act, 59 Stat. 669. . . .² Section 2 (a) of that Act, 22 U.S.C.A. § 288a (a), states that "international organizations shall, to the extent consistent with the instrument creating them, possess the capacity—(i) to contract; (ii) to acquire and dispose of real and personal property; (iii) to institute legal proceedings."

¹ Citing Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, I. C. J. Reports, 1949, p. 174; this JOURNAL, Vol. 43 (1949), p. 589.

² This JOURNAL, Supp., Vol. 40 (1946), p. 85.

Whether the United Nations may sue the United States is a more difficult question. It is apparent that Article 104 of the Charter of the United Nations was never intended to provide a method of settling differences between the United Nations and its members. It is equally clear that the International Organizations Immunities Act does not amount to a waiver of the United States' sovereign immunity from suit. The precise question is whether the capacity to institute legal proceedings conferred on the United Nations by that Act includes the competence to sue the United States in cases in which the United States has consented to suits by other litigants.

The broad purpose of the International Organizations Immunities Act was to vitalize the status of international organizations of which the United States is a member and to facilitate their activities. A liberal interpretation of the Act is in harmony with this purpose.

The considerations which might prompt a restrictive interpretation are not persuasive. It is true that history has recorded few, if any, instances in which international entities have submitted their disputes to courts of one of the disputing parties. But international organizations on a grand scale are a modern phenomena. The wide variety of activities in which they engage is likely to give rise to claims against their members that can most readily be disposed of in national courts. The present claim is such a claim. No political overtones surround it. No possible embarrassment to the United States in the conduct of its international affairs could result from such a decree as this court might enter. A claim for cargo loss and damage is clearly susceptible of judicial settlement. . . .

International organizations, such as the United Nations and its agencies, of which the United States is a member, are not alien bodies. The interests of the United States are served when the United Nations' interests are protected. A prompt and equitable settlement of any claim it may have against the United States will be the settlement most advantageous to both parties. The courts of the United States afford a most appropriate forum for accomplishing such a settlement.

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Finally, it cannot be denied that when the Congress conferred the privileges specified in the International Organizations Immunities Act, it neither explicitly or implicitly limited the kind or type of legal proceedings that might be instituted by the United Nations. There appears to be no good reason for the judicial imposition of such limitations.³

³ Plaintiff's capacity to sue as assignee of UNRRA was not questioned in *United Nations v. Adler*, 90 F. Supp. 440 (S. D. N. Y., May 18, 1950). In *International Refugee Organization v. Republic S. S. Corp.*, 92 F. Supp. 674 (D. Md., July 8, 1950), the court held that although the IRO had capacity to sue, it could not bring in a Federal District Court an action against a Panamanian corporation in which no "federal question" was involved. Jurisdiction based on "diversity of citizenship" was limited to cases between citizens of different States, or between citizens of a State and foreign states or citizens or subjects thereof; and the IRO was not a citizen (or corporation) of one of the United States. Jurisdiction of the Federal courts did not extend to "suits solely between aliens where no federal question is involved." Al-

Recognition—acts of contending Chinese governments

BANK OF CHINA v. WELLS FARGO BANK & UNION TRUST CO. 92 F. Supp. 920.

U. S. District Court, N. D. Calif., July 17, 1950. Goodman, D. J.

Plaintiff, a banking corporation organized under Chinese law in 1912 and two-thirds of whose stock was owned by the Chinese Government, had a substantial deposit with defendant. After Chinese Communist forces gained control of most of the Chinese mainland, plaintiff's directors moved its main office to Hong Kong. Chinese Communist authorities took over the old main office and named new persons to conduct the plaintiff bank. Thereafter the émigré directors and management of plaintiff bank brought this action for repayment of the deposit. Attorneys named by the newly constituted directors and managers sought to be substituted for those acting for the émigré interests. Denying without prejudice motions for summary judgment, for substitution of attorneys, and to dismiss, the court continued the trial *sine die* and authorized defendant either to deposit the fund with the court or to place it in a separate trust account approved by the court. Judge Goodman said in part:

Although by virtue of majority stock ownership, the Government of China controls this corporation, it is not a public corporation nor are its funds government funds. . . .

The émigré directors of the Bank are now scattered. . . . Some of these directors represent a government which is not now, and may never again be, in a position to speak for the Chinese people in respect to the manner in which the corporation shall function in China. The others may or may not be the directors whom the private stockholders now desire to speak for them. It is difficult to perceive how the interests of the corporation, its stockholders, and its depositors will be protected by placing the res in dispute at the disposal of a group of these directors.

To deny the émigré directors control of these funds is not to deprive a government, still recognized by the United States, of funds to carry on its fight for survival. For these are corporate funds which should not be dissipated for purposes other than those of the corporation.

On the other hand, the new management in China is not yet so established as to warrant placing these funds in its hands. Who the private stockholders wish to represent them is at present unknown. The new government directors represent a government, which although in control of the Chinese mainland, has not yet put down all organized resistance. Only time will tell whether this government will become a stable government.

Furthermore, recent international developments bar any decision of this Court which would place these funds in the control of the new

though the IRO might be regarded as constituted under an agreement equivalent to a treaty, the cause of action did not "arise under a treaty of the United States" within the terms of the section conferring on the Federal courts jurisdiction over actions arising under such treaties.

management of the bank in China. For this Court to recognize the acts of the so-called "Peoples Government," in so far as they relate merely to a Chinese corporation which must function under that government, might not necessarily run counter to a merely negative policy of non-recognition on the part of the United States. But, since the announcement of the President on June 27, 1950, that the United States will defend Formosa (the present seat of the de jure Chinese government) the policy of the United States appears to be one of active intervention against the aims of the "Peoples Government." Although the Bank of China is a private corporation, the Court must realistically recognize that if the \$626,860.07 in controversy were placed in the hands of the new management of the Bank of China, the "Peoples Government" would be aided and abetted.

The only solution which gives promise of affording protection to the Bank of China, its stockholders, and depositors, and at the same time supporting the foreign policy of the United States, is to leave these funds where they are for the present.

Immunity—property of secretary of delegation to United Nations

AGOSTINI v. DE ANTUENO. 99 N. Y. S. (2d) 245.

New York Municipal Court, June 5, 1950. Culkin, J.

When a landlord brought summary proceedings for recovery of possession of property occupied by tenant Argentine national, who claimed immunity as Third Secretary of the Argentine Permanent Delegation to the United Nations, and moved to vacate the proceedings, the court denied the motion, holding that it had jurisdiction despite the immunities of members of the staff of permanent delegations to the United Nations under the Headquarters Agreement, 61 Stat. 756, this JOURNAL, Supp., Vol. 43 (1949), p. 8. Though this agreement provided that members of such delegations (as agreed upon by the Secretary General, the United States, and the government concerned) should have in the United States "the same privileges and immunities, subject to the corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it," the court said:

In a juridical sense, federal treaties and federal statutes stand on the basis of absolute equality. . . .

The constitutional structure of the United States makes it clear that there are limitations to the treaty-making powers of the Federal Government. Where the act of a state legislature is constitutional under its reserved powers, the Federal Government is bound to respect it in the negotiation and conclusion of its treaties and in the enactment of its laws. *Siemens v. Bofer*, 6 Cal. 250.

Citing *Ohio ex rel. Popovici v. Agler*, 280 U. S. 379, this JOURNAL, Vol. 24 (1930), p. 382, which held that the exclusive jurisdiction granted the Federal courts in actions against consuls did not prevent State courts taking jurisdiction over divorce actions against consular officers, the court added:

Summary proceedings for the recovery of possession of realty by a landlord against a tenant are historically a matter of local concern in the same manner as proceedings for divorce. . . .

There appears to be no doubt that real property held by diplomatic officers in a foreign state, and not pertaining to his diplomatic status, is subject to local laws. . . .

In these special proceedings for recovery of real property, the court said: "The jurisdiction of this court is basically in rem, and not in personam."

Recognition—retroactive effect on actions of formerly recognized government

BOGUSLAWSKI v. GDYNIA-AMERYKA LINJE ZEGLUGOWE SPOLKA AKCYJNA. 84 Ll. L.R. 169, [1950] 2 All Eng. L.R. 355.

England, Court of Appeal, June 15, 1950. Bucknill, Cohen, Denning, L. JJ.

The plaintiffs, Polish seamen who served on a Polish vessel, sued for sums allegedly due from the defendant Polish owner of the vessel, according to contract made on their behalf by officials of the Warsaw Government (the Polish government-in-exile in London) after the establishment in June, 1945, of the Provisional Polish Government of National Unity (Lublin), but before its recognition by the British Government. The British Foreign Office issued a certificate stating that the London Polish Government had been recognized until midnight, July 5-6, 1945, and that from that moment the London Polish Government was no longer recognized, but the Lublin Government recognized instead as the Government of Poland.

Upholding the decision of the lower court that the plaintiffs were entitled to the sum, the court rejected the contention that recognition of the Lublin Government had retroactively invalidated the actions of the Warsaw Government with relation to vessels and their crews not in Poland while it was still the recognized government. Cohen, L. J., said:

In these circumstances it seems to me that the acts of the old Polish Government prior to midnight on July 5/6 are valid and binding on the new Polish Government, at any rate unless and until the new Polish Government rescinds or repudiates them, an event which it is common ground between the parties has not occurred so far as any act relevant to the present case is concerned.

In taking this position he explained and distinguished the case of *Luther v. James Sagor & Co.*, [1921] 3 K.B. 532, and agreed with Stone, J., in the case of *Guaranty Trust Co. v. United States*, 304 U.S. 126. In relation to the same point Denning, L. J., said:

In the ordinary way, of course, our Courts do give retroactive effect to the recognition of a Government, in that we recognize the acts of that Government within its proper sphere to have been lawful, not merely from the time of recognition but antecedently from the time that it

was an effective government. . . . The retroactive effect must, however, be confined to acts of the Government within its proper sphere, that is to say, acts with regard to persons and property in the territory over which it exercised effective control (*Banco de Bilbao v. Sancha*, [1938] 2 K.B. 176); or acts with regard to ships which are registered there and whose masters attorn to them: the *Arantzazu Mendi*, [1939] A.C. 256; 63 Ll. L. Rep. 89. Just as the new Government only gains its right to recognition by its effective control, so also the extent of retroactivity is limited to the area of its effective control.

The Polish Government officials had the power and authority under Polish law, according to the court, to make contracts on behalf of the defendant company, even though their offer may not have been accepted on behalf of plaintiff crew members until after recognition of the new Lublin Polish Government. Denning, L.J., said:

So far as our Courts are concerned, it was nothing more than a case of an old Government going out of office and a new Government taking over. . . . Decrees which were passed by the old Government will remain effective except in so far as the new Government decides to repeal them. Rights and obligations which have become vested under the old Government will remain intact unless the new Government passes a decree divesting them if it can lawfully do so. Orders which have been issued by the old executive may have lawfully been obeyed unless the new executive countermands them. Curators who have been appointed by the old Government will remain Curators unless and until the new Government dismisses them. So also it seems to me that offers made by the old Government may lawfully be accepted during the time of the new Government unless they have meanwhile been revoked. . . . [the principle of continuity] requires that the new Government shall stand in the shoes of the old Government in all respects except in respect of acts of members of the old Government which were *ultra vires* or acts which were done by them, not in good faith as trustees for the state, but for an alien and improper purpose.

The Lord Justice then went on to say that the acts done by the members of the Warsaw Government were not *ultra vires* and were, in view of the situation existent at the time, done in good faith.

BOOK REVIEWS AND NOTES

Scienza Giuridica e il Diritto Internazionale. By Roberto Ago. Milan: A. Giuffrè, 1950. pp. 108.

The highly interesting study under review defends the purely scientific character of the science of international law. This presented a particularly difficult problem, not only because the scientific character of the science of law in general has been questioned, but also because the legal character of international law itself has been attacked. Grotius and his followers found the basis of international law in natural law. The first difficulty arose with Hobbes, who bases law on the authority of the state over its subjects. But the real problem posed itself with the rigorous positivism of the nineteenth century, according to which all law must be "posited," historically man-made; natural law is completely rejected. The consequence was either the denial of the legal quality of international law (Hegel, Austin, Lasson, Binder, recently the Australian, Patton) or, as the majority recognized that the legal quality of international law is proved by the practice of states, attempts at construction were made, all of which have been shown to be untenable: the basis of "consent," international law as "external municipal law" (Zorn), the theory of auto-limitation (Jellinek), the theory of the "collective will" (Triepel, Anzilotti).

In this century the old positivism has been overcome by Kelsen's normativism, recognizing that the legal norm is not a command, but a judgment, and founding international law on a hypothetical, presupposed "basic norm." Further attempts were made in Italy by Perassi, and recently by Ziccardi and Sperduti. But neither of these attempts, nor a return to natural law (Verdross), nor a foundation in sociological reality can solve the problem (Duguit, Scelle, Quadri, Ross).

To solve the problem, the author believes, it is necessary to revise critically the very basis of positivism. Law must be freed from all extra-juridical elements, ethical as well as sociological; the science of law, as such, must base itself exclusively on data offered by empirical reality, in order to determine its own concepts and conclusions. It must free itself of all *a priori* assumptions. The science of law must analyze empirical reality. An objective study of the reality of social life shows particular social judgments which are juridical, namely, those which are characterized by exercising a concrete influence on the respective position of the members of the social community, granting to or taking from them the possession of certain subjective situations, if certain factual conditions are given. The second point on which positivism needs a basic revision is its dogma that all law

must be "positive," posited by an act of human will, and must have a "source." According to the author, there are, apart from legal norms so formed, the norms of "spontaneous formation" which logically can have no "source." With regard to the norms of "spontaneous formation," the science of law has only the problem of their existence, not of their origin. Customary law—and the whole general international law is customary law—is always a law of spontaneous formation. This concept eliminates all the insurmountable difficulties into which the theory of custom as a "source," with its two elements: *usus* and *opinio juris* has run. The whole law consists not only of "positive," or posited law, but also of spontaneous law.

The study under review is, both in its critical and in its constructive part, very interesting and it is to be hoped that it will stimulate further study and discussion.

JOSEF L. KUNZ

Einwirkung des Krieges auf die Nichtpolitischen Staatsverträge. By Richard Ränk. Uppsala: Svenska Institutet för Internationell Rätt, 1949. pp. 234. Index. Kr. 10.

As noted by Cardozo in *Techt v. Hughes*, the effect of war on treaties is one of the unsettled problems of international law. The growth in the number and variety of multipartite treaties has increased the complexity of the problem and its significance for the international society. Dr. Ränk has made a systematic and conscientious study, in the light of recent practice, of the problem as it concerns non-political multipartite treaties. After briefly reviewing the various theories of the effect of war on treaties, he examines in detail the practice with respect to multipartite treaties in a number of selected fields—industrial and literary property, private international law, transportation, and communications. Both in the fields covered and in much of the material examined, the study parallels parts of Tobin's *The Termination of Multipartite Treaties*. The book would have been more useful if the author had devoted some attention to certain types of multipartite treaties not extensively treated by Tobin, such as the conventions for the control of narcotics. The author, nevertheless, makes a valuable contribution in reviewing the practice during and after the second World War, and in drawing upon little-known sources of information, including some specialized periodicals published in Germany during the war. His conclusions are restrained, and appear to confirm those of Tobin. War generally does not terminate non-political multipartite treaties, but may lead to the suspension or non-observance of the provisions of such treaties as required by the exigencies of the situation, even in relations with and between non-belligerents.

Unlike many Continental authors, Dr. Ränk recognizes the importance of

the design of the parties in determining the circumstances under which a party may lawfully modify or escape its obligations under a treaty. In this connection, he fails to raise the question whether it is analytically helpful to consider "the effect of war on treaties" as a distinct legal problem. The author's own study suggests the conclusion that it is not the existence of "war" as such, but rather the existence of any condition, such as hostilities, whether recognized as "war" or not, or any other grave emergency, that may within the design of the parties justify the suspension of the operation of a treaty provision. Dr. Ränk does not consider, for example, the significance of the suspension in 1941 by the United States as a non-belligerent of its obligations under the Load-Line Convention of 1930, which was sought to be justified by references to the doctrine of *rebus sic stantibus* and to the intent of the parties, but which could be factually referred to as an "effect of war on treaties." The legal ambiguity of the term "war" (see Grob, *The Relativity of War and Peace*) points in the same direction.

A practical lesson to be drawn from the book is the desirability of clauses expressly indicating the intent of the parties as to the fate of a multipartite treaty in time of war or other emergency. Such a clause is found, for example, in the International Civil Aviation Convention of 1944 (Article 89). It is to be hoped that efforts to draft and insert such clauses in multipartite treaties will not be defeated by prudish objections to recognizing the possibility of war in the future.

The author and the publishers are to be commended for the excellence of the aids to the reader (table of cases, bibliography and index) found at the end of the volume.

OLIVER J. LISSITZYN

A Study of Statelessness. United Nations, Department of Social Affairs. Lake Success: 1949. pp. xiii, 190. Annexes. \$1.25.

This monograph was prepared in pursuance of the request of the Economic and Social Council to the Secretary General of the United Nations in consultation with the International Labor Office, the International Refugee Organization, and Professor Paul Niboyet. It is intended to serve as a preliminary study of the general problem of statelessness in order to point up areas in which the United Nations can and should have an interest. As the Secretary General emphasizes throughout his report, the United Nations is, in a very real sense, the only body capable of representing the interests of more than a million stateless persons. It is true that international conventions exist which have determined the status of certain groups of stateless persons, but thousands of such persons do not fall within these categories. Also the protection of stateless persons has been provided for only through the International Refugee Organization which is due to disappear in the near future. Hence the problem becomes more urgent.

The Secretary General addresses the study to two basic problems; (1) the improvement in the status of stateless persons, and (2) the elimination of statelessness in the future. Illustrations are drawn principally from experiences encountered in dealing with European refugees; the nature of the problems they face as stateless persons, the ameliorative measures which have been utilized in the past, and the proposals which have been and could be advanced to provide more equitable treatment. The recommendations look with especial favor on the further development of multilateral conventions rather than specific reciprocal treaties.

As a survey of this important subject the monograph is an important contribution. Especially valuable is the classification of problems and techniques to be treated. The appendices contain illustrative documents and the texts of pertinent conventions. Further systematic study and analysis of the problem of "the stateless million" should be made without delay.

CATHERYN SECKLER-HUDSON

Succession in International Law. By Erik Castrén. (Publications of the Finnish Association of Lawyers.) Helsinki: Akateeminen Kirjakauppa, 1950. pp. xx, 280. Index.

This recent, painstaking, and scholarly work is by a professor of international law in the University of Helsinki, Finland. It covers one of the most controversial and difficult branches in the entire field of international law. The author has sought to cover the questions arising out of transfers of territory by various means in their relation to the rights and duties of the states concerned; also those arising from treaties, and pertaining to national property and debts, as well as the juridical position of the population in the areas included in such transfers.

Within the space of 280 pages of Finnish-language text, the author has condensed a vast research, for the documentation includes references to the published works and writings of 148 leading authorities in international law, including American, English, Continental European, and Chinese. These references bring out forcefully the great divergence of opinion which exists on most of the questions among the leading scholars of the world.

Certain studies have been published in this field during the past century and in the early part of the present century, although in rather brief form. However, in view of the many changes in practice and concepts, most of these earlier works are out of date. Two or three larger works of special merit appeared about 1930, but the chief emphasis was placed on questions concerning national debts. In view of the present importance of these questions in his native Finland, by reason of territorial losses and changed conditions, the author has sought to make a comprehensive survey, as the events of the last World War and the resulting consequences have been heretofore without scientific explanation. The author has, therefore, at-

tempted to cover the entire field of succession in international law in one systematic presentation, with special emphasis on newer developments.

As an indication of the value placed on this new work in Europe, the author has been invited to deliver a series of lectures on this subject at The Hague Academy of International Law in the summer of 1952, which lectures are to be published in French in the series of the Academy.

CHARLES E. HIRSIMAKI

The International Law Association. Report of the 43rd Conference, held at Brussels, August 29-September 4, 1948. London: 1950. pp. cxxi, 318.

The Brussels Conference celebrated the 75th Anniversary of the International Law Association in the city of its foundation, the event being suitably celebrated in the Hall of the *Académie*. The Conference considered the report of Professor Lauterpacht on Human Rights under the Charter of the United Nations and also the International Bill of the Rights of Man. One-half of the volume now before us is devoted to the detailed discussions on the various points of the report. There was notable emphasis by most of the speakers on the danger of permitting any set of principles to become merely academic and without binding legal obligation or sanctions. This indeed still remains a problem to be solved. The Conference struggled with it valiantly, bringing it into practical reality by reference to the violations on the part of Bulgaria, Hungary, and Rumania of the human rights provisions contained in the Paris Peace Treaties of 1947. The report of Andrew Martin of London on the diplomatic *impasse* respecting these violations constituted a valuable clinical study of the main problem.

The Conference adopted a resolution to the effect that greater use should be made of the procedure of arbitration in international disputes, and more frequent reference of such disputes to the Permanent Court of Arbitration or to the International Court of Justice deciding *ex aequo et bono*. International commercial arbitration was also not neglected. The Association urged its branches and members to work for the reform of arbitration law in coöperation with other organizations, so as to obtain legislative sanction for the binding character of agreements to arbitrate in international trade and industry. The Conference also adopted principles for better safeguarding the interests of children as a result of the divorce of parents in another jurisdiction. In the field of maritime law it adopted resolutions for amending certain of the York-Antwerp Rules of General Average.

In addition to the subjects on which specific action was taken, valuable papers were presented by Dr. Yuen-li Liang on "The United Nations and the Development and Codification of International Law"; by Jonkheer P. R. Feith on "Rights to the Sea-bed and its Subsoil"; and by Maître J. P. Govare on "*Les Sociétés Universelles*."

ARTHUR K. KUHN

Inter-American Juridical Yearbook, 1948. Washington: Pan American Union, 1949. pp. x, 394. Index. \$3.00.

Just as, until a few years ago, Pan America left much to be desired from an organizational point of view, so the documentation on this continental system was, to put it mildly, in very bad shape. Since the Mexico City Conference of 1945 the task of a complete reorganization of what is now called the Organization of American States (OAS) has been energetically attacked. The Bogotá Conference of 1948 laid the new foundations and the work of reorganization is now in full swing. The new organizational centralization has also led to better documentation. The new review, *Annals of the OAS* is now joined by the *Inter-American Juridical Yearbook*, of which the first volume has been published. It is a technical publication, destined to give a survey of the development of American regional law during the year 1948.

The volume gives the most important documents in the four Pan-American languages; reviews of books published in 1948, a summary of articles on international law in reviews published in America, articles and notes. The articles are interesting, the notes on current American developments (Present Status of Official and Unofficial Inter-American Organizations, Privileges and Immunities of the OAS, Controversy between Costa Rica and Nicaragua, Agreement between the Council of the OAS and the Pan-American Institute of Geography and History, Status of Pan-American Treaties) of utmost importance for the knowledge of the OAS and its development.

It need hardly be said that the volume is indispensable to the international lawyer and, particularly, to the student of the OAS. As the Secretary General remarks, this yearbook will gain an enhanced interest when the new Inter-American Council of Jurists starts its task. It is to be hoped that the volume for 1949 will soon be published. The credit for editing this important and beautifully presented volume goes to Professor Charles G. Fenwick, Director of the Department of International Law and Organization of the Pan American Union, who has also contributed to its contents many articles and book reviews.

JOSEF L. KUNZ

The Customs Union Issue. By Jacob Viner. New York: Carnegie Endowment for International Peace, 1950. pp. viii, 221. Index. \$2.50.

Professor Viner's study on customs unions is an outstanding contribution to the literature on a subject which has recently become of increasing interest to the general student of international affairs. Like his earlier studies on dumping and on the most-favored-nation clause, this slender volume is a classic in its field.

Professor Viner's general conclusions are well summarized in his own words:

Customs unions are not important, and are unlikely to yield more economic benefit than harm, unless they are between sizable countries which practice substantial protection of substantially similar industries. But customs unions of this character have always been extremely difficult to negotiate in a nationalistic and protectionist world. They have in recent times become more difficult to negotiate for a variety of reasons.

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For the long-run problem of raising the level of economic well-being for the peoples of the world in general, customs union is only a partial, uncertain, and otherwise imperfect means of doing what world-wide non-discriminatory reduction of trade barriers can do more fully, certainly, and more equitably . . . (p. 135.)

Accordingly, he believes that under existing conditions the only practical path is "the balanced multilateral reduction of trade barriers on a non-discriminatory basis," which is a principal objective of the Havana Charter for an International Trade Organization and the method actually followed in negotiation of the General Agreement on Tariffs and Trade.

Professor Viner's "sober and disillusioning" conclusion regarding the efficacy of customs unions may come as a shock, perhaps as a challenge, to many persons who have been hopefully following the efforts currently being made, in connection with Marshall Plan aid, to attain a prosperous and strengthened Western Europe through some form of "economic integration." While conceding that a customs union embracing all or most of Western Europe would, "in the net, contribute both to the economic recovery of Western Europe, once the necessary adjustments had been made, and to a greater degree of international specialization of production" (p. 133), Professor Viner indicates that the practical problems involved will probably preclude actual realization of such a union.

The most important contribution which Professor Viner has made in this study is his objective analysis of "The Economics of Customs Unions" (Chap. IV)—the first time, it is believed, that anyone has subjected the problem to such a detailed and critical analysis from a purely economic point of view. No specialist in the field of tariff policy will be able hereafter to ignore the criteria which Viner has concisely set forth for the appraisal of the economic advantages and disadvantages of any particular customs union project (pp. 51-52).

Although Professor Viner disclaims intention of giving a history of the customs union movement, his study is filled with historical data that illustrate his points and provide valuable information, especially his chapters on "Political Aspects of Customs Unions," "The Compatibility of Customs Union with the Most-Favored-Nation Principle," and "Exemption from Most-Favored-Nation Obligations of Preferential Arrangements other than Customs Union." A valuable brief analysis of the ITO Charter is

given in Chapter VI and a general survey and conclusions are found in the final chapter, "Prospects for Customs Unions."

The specialist who is particularly interested in the most-favored-nation clause in relation to customs unions might have wished for some reference to United States treaty policy from our adoption of the unconditional clause in 1922 to the drafting of the Havana Charter. Although mention is made of the British position that in the absence of an express exception, most-favored-nation obligations are a barrier to customs union (p. 12), no mention is made of the same position taken by the Legal Adviser of the Department of State in 1931 in connection with the Austro-German *Anschluss* of 1931 (Hackworth's *Digest*, Vol. V, p. 295). In this connection, it is interesting to note that although the customs union exception to most-favored-nation obligations has become standard in commercial treaties and agreements of the United States since 1935, prior to that year express mention of the exception was found only in three treaties (Estonia, 1925; Latvia, 1928; and Poland, 1931), and one executive agreement (Rumania, 1930).

HONORÉ M. CATUDAL

La Nullité de la Politique Internationale des Grandes Démocraties (1919-1939). L'échec de la Société des Nations. By Emile Giraud. Paris: Recueil Sirey, 1949. pp. xvi, 280.

Habent sua fata libelli. This work was originally conceived in 1937 as an exposition of the illusions and weaknesses of the policies of the United Kingdom and France. The author wrote the book in 1941-1945, brought it up to date in 1946 and published it in 1949.

It is a remarkable book in many respects. While it covers the ground dealt with by other historians and lawyers (the period of the so-called "Long Truce") it does so by a different method. Giraud speaks with contempt of "library historians" whose judgment is based on the study of dry papers without having knowledge of the climate in which the events took place (p. ix). It can hardly be classed as a historical work in the conventional meaning of the word. It is rather an interpretation or philosophy of history by an analysis of the *idées-forces* that have determined the course of this recent, decisive period: the will to world domination of the totalitarian states; isolationism (not only of the United States but also of Great Britain and France); pacifism (without, however, discussing at all the doctrine of "peaceful change" worked out mostly by American scholars); weakness of the European democracies, the mediocrity of their leadership and the lack of adjustment of their institutions; and finally the insufficient development of a genuine internationalism. Historians may argue with Professor Giraud on his sweeping statements, "no other war was so easily foreseeable and avoidable than the second World

War" (p. vii), and "the world after the second World War is the same as that of the between wars period" (p. xii). Philosophers may claim that the analysis should not stop there but should be continued to ascertain why the five factors developed to such a fateful extent. It is a courageous book, written by a Frenchman and by a philosopher who does not believe in neutrality in spiritual matters, and is pitiless in its criticism of France.

Its discussion of the legal problems is not technical and legalistic but realistic and pragmatic. According to Giraud, in international as in national life, the legal or juridical element is not the most important (p. 5). He has an unorthodox view on the universality of an international organization. Such organizations can get along without universality, given the loyalty and determination of their members. This aspect of the book finds eloquent expression in the section explaining the failure of the League of Nations. Here the author discusses a subject dealt with before by Lord Robert Cecil, Bourquin, Epirotis and others in a far more realistic way, for the author's conclusion is that it was not in Geneva but predominantly in London and Paris that the fate of the League was decided. What went on in these two capitals was far more decisive of the outcome of the battle for and against the League than what happened in Geneva itself. Only briefly does the author deal with the problems of the League *in abstracto*. He proves that its idea was a sound one and that its concept and organization were good. On the other hand, he violently attacks the superstition of texts, procedures, resolutions, accords in principle, maneuvers, procrastination and other devices to conceal the impotence and indecision of the international community.

The reader will be deeply impressed by Giraud's memorandum of September 15, 1938 (before Munich), which is reproduced at the end of the book, not out of vanity, but to prove that the author had realized in time the dangers of appeasement of Hitler and had made them known—alas without success—to those in power.

Animated by a high moral spirit and by a deep faith in democracy, this book cannot fail to move the readers. May they be numerous.

JACOB ROBINSON

American-Russian Relations in the Far East. By Pauline Tompkins. New York: Macmillan Co., 1949. pp. xiv, 426. Index. \$5.00.

There is little material in this book which is new, in the sense that it was not previously available in secondary source-books. There is much material, however, which is viewed from a fresh angle, which brings into juxtaposition information from diverse sources, and which is provocative of new thought. In particular, much space is devoted to a valuable re-statement and analysis of the Allied Siberian intervention following World War I.

The book opens with a brief review of United States-Russian relations from earliest times, and the emergence of Japan as a potent factor in Far Eastern affairs. The bulk of the text deals with the period from 1914 to United States recognition of Soviet Russia in 1933. The concluding section deals, all too briefly, with the results of American recognition and the deterioration of United States-Russian relations in recent years. It ends with a plea for a stronger international order. In the appendices are to be found a selection of significant treaties and other international agreements affecting international relations in this area, and particularly in North China, Manchuria, and Korea.

The picture given of almost all the important developments in the Far East during the past generation as part of a three-cornered power struggle between the United States, Japan, and Soviet Russia is, however, vastly oversimplified. The important effect exercised upon the course of events in the area by China is largely ignored. It is suggested that this fault is due to the position deliberately adopted, rather than to any lack of appreciation by the author of the complicated nature of her material.

L. W. WADSWORTH

NOTES

Droit International et Histoire Diplomatique. Documents Choisis. By Claude-Albert Colliard. Paris: Editions Domat-Montchrestien, 1948. pp. xii, 528. Index. This is a valuable collection of documents for the use of students of international law and diplomatic history, especially designed for France but, because of the importance and wide range of the items chosen, a most useful desk-book for any specialist in the field. Prepared by a professor of international law at the University of Grenoble, it is the first such collection to appear in French since the LeFur-Chklaver *Recueil* of 1934. Here we find reproduced the great constitutional documents of the international community (League of Nations Covenant, United Nations Charter), and many texts illustrative of particular situations (perpetual neutrality; mandate; British-American Liquor Treaty of 1924, long-term lease, Munich Accord); while a number are of special interest to French students (Franco-Russian Treaty, De Gaulle-Churchill Agreement, Franco-Vietnam Treaty, etc.).

The sources of the documents are given in a special table. While fully recognizing the difficulties faced by all French scholars because of the depleted state of their libraries, this reviewer believes that some of the sources used were not the best. A number of treaties have been reproduced from texts appearing in *Le Monde*, a newspaper, while the Hay-Pauncefote Treaty of 1901 and the Bunau-Varilla Treaty of 1903 were taken from a weekly, *L'Europe Nouvelle*. The "British Declaration of 1939" was found in a book by Léon Noël, *L'Agression Allemande Contre la Pologne* (Paris, 1946). Finally, a number of translations are taken from other collections when it would have been preferable for the author of the present collection to have given his own translation.

JOHN B. WHITTON

La Teoría Pura del Derecho. By Josef L. Kunz. Mexico: Imprenta Universitaria, 1948. pp. xv, 153. The many American admirers of the distinguished Austrian scholar, Hans Kelsen, now a citizen of the United States and just celebrating his seventieth birthday, will welcome this analysis of the great treatise which marks as it were the culmination of his philosophical thought. The four lectures which constitute the volume were given by one who himself was a scholar of the Vienna school and who now in his own name holds a high rank among political philosophers. The fact that the lectures were given before the National School of Jurisprudence in Mexico City explains the Spanish text; but it is to be hoped that the idiom of our southern neighbors is now sufficiently familiar to American students to enable them to read the volume with interest and profit.

The author first describes the development of Professor Kelsen's theory of law, then the definitive form given to it in the treatise published in 1945 under the title, *General Theory of Law and State*, then the world-wide discussions to which the theory has given place. What is perhaps of greatest interest to American readers is the adaptation of Kelsen's earlier rigid positivism to the changes in the international situation that have resulted from two world wars, one still in progress when the *General Theory* went to press. Those of us who were brought up on Austin's *Jurisprudence* remember the shock with which we came to realize after the first World War that the positivist conception of international law as a body of rules which acquired legal character by reason of the consent of states was wholly inadequate to constitute the basis of a world of law and order. So, too, the reader of Kelsen will observe with interest how his followers broke away from him and recognized, as notably Verdross did, that unless recourse be had to the great traditional principles of reason and justice, to the "law of nature" in the more correct sense, international law could never meet the needs of the international community. It is therefore no disparagement of the great work of the master when Professor Kunz, his pupil, ventures to differ with him on minor points. In fact, the present volume leads us to ask of Professor Kunz an elaboration of the four lectures in English, filling in the gaps and helping the American student to understand better Kelsen's contribution to the theory of law. Professor Kunz quotes a Spanish jurist as saying that the philosophy of law in the coming years must necessarily and essentially be a "dialogue with Kelsen."

C. G. FENWICK

1949 Annual Review of United Nations Affairs. Edited by Clyde Eagleton. New York: New York University Press, 1950. pp. x, 322. Index. \$5.00. In June, 1949, due to the happy initiative of Professor Clyde Eagleton and under his direction, the first session of the New York University Institute for Annual Review of the United Nations was held in New York City. The present volume reports its proceedings, which included lectures by leading representatives of the United Nations and the discussions that followed. Admirably organized and edited, this is an invaluable survey of the vast gamut of United Nations activities, and in fact constitutes one of the best general textbooks on this subject yet to appear. This is true despite the fact that the book suffers from some of the usual defects of a symposium, notably unevenness in the quality of the chapters, some being rather dull and elementary, others colorful and profound.

Despite its title, this is no mere yearbook; some of the lectures have permanent value, notably the lecture on United Nations Documentation by Harry N. M. Winton, Chief of the Documents Index Unit, Library Services; and the discussions of domestic questions by Dr. Yuen-li Liang, Director of the Division for the Development and Codification of International Law. It should be added that the Institute, together with this useful volume, offers to prominent members of the United Nations Secretariat a unique outlet for the expression of their views, an opportunity which they appear to have seized upon with alacrity, discussing some of the most mooted questions concerning international organization with remarkable candor. This is particularly evident during the question and answer period following each lecture, discussions in which the Director and his excellent staff of discussion leaders play a major rôle.

JOHN B. WHITTON

Anglo-Amerikanisches Rechtswoerterbuch I. Teil Englisch-Deutsch. By Robert F. Weissenstein. Zürich: Schulthess & Co., 1950. pp. 199. Sw. Fr. 22. Foreign language legal dictionaries often contain an accumulation of translations which, although they may or may not cover the exact meaning of a particular legal term, add up to a kind of thesaurus of legal synonyms. They serve best the user who has to have a good knowledge of legal terms in both languages. Weissenstein's book offers far more. It explains the legal terms in the other language and gives examples of their principal use, sometimes presenting in a few words the very essence and the importance of a legal institution alien to the other country, sometimes showing the similarities and distinguishing features. The author does not confine exemplification to English terms, but deals primarily with American usage, especially in the field of Federal and New York law.

Anyone who is concerned with translations of foreign legal texts and who has to check translations to be used in a specific case—especially expert witnesses and interpreters in court actions—will find here a most reliable and often indispensable tool.

International law practice dealing with the German language is not confined to Germany, Austria and Switzerland. The dispersal of refugees who fled all over the world to escape oppression by Hitler alone resulted in the establishment of legal ties with other countries in which German legal terminology has been employed in various arrangements, status relations, and in last wills and testaments.

This unique work of the author, a member of the New York Bar, is not only of great practical value but is also an important contribution in the field of international law research.

MARTIN DOMKE

The Ratification of International Treaties. By José Sette Camara. Toronto: Ontario Publishing Co., 1949. pp. xii, 173. The book under review is a dissertation for the degree of Master in Civil Law at McGill University by the vice consul of Brazil at Montreal. The study to which Kelsen has written a foreword is a competent monograph, making use of all the available literature, the practice of states, treaties, and investigations made by League of Nations committees. It deals with all the relevant problems from negotiation and signature to ratification of treaties, their entry into force, registration, reservations, forms of ratification, and ac-

cession. Emphasis is put upon the fact that signature, although necessary, has no legally binding effect. Contrary to the agency theory of earlier writers, it is now undoubtedly the law that a treaty, apart from exceptions which are studied, needs ratification in order to come into force. In consequence, there is no legal duty to ratify; on the other hand, ratification has no retroactive effect. Using the constitutions of most states, the author studies the problem of the relevancy of constitutional limitations from the point of view of international law. The theoretical basis of the study is the Pure Theory of Law. In studying the detailed problem of the ratification of treaties, the monograph is careful to integrate this particular problem within the whole system of law, municipal and international.

Schweizerisches Jahrbuch für Internationales Recht. Vol. V, 1948. Zürich: Polygraphischer Verlag, 1948. pp. 286. Sw. Fr. 20. The fifth volume of the valuable Swiss Year Book of International Law is again excellent. It contains in its documentary part extensive reports on the different fields of conflict of laws and a highly interesting report on Swiss developments in the field of international law from the pen of Professor P. Guggenheim. Many items in this report are of importance to the international lawyer. Particular attention should be directed to the new Swiss Statute of the International Administrative Unions which have their seat in Switzerland.

Among the articles we might mention a study on the draft convention on freedom of information and a fine investigation as to the relations between international law and conflict of laws. It is only natural that the problem of Switzerland's permanent neutrality should occupy a prominent place. The closing article by Max Hagemann is a painstaking detailed investigation as to whether Switzerland, by her accession to the International Court of Justice and the acceptance of Article 94, paragraph 2, of the Charter of the United Nations, has in any way endangered her neutrality. The opening article by Judge Max Huber on Switzerland's neutrality contains the advice that Switzerland, in these times, cannot rely on the law alone, but must supplement her efforts by an adequate neutrality policy, convincing all nations that they can trust Swiss neutrality which never will spring surprises and that Swiss neutrality is to the advantage of all of them.

JOSEF L. KUNZ

The Yearbook of World Affairs, 1950. London Institute of World Affairs. London: Stevens & Sons, Ltd., 1950. pp. viii, 392. 20 s. This annual volume, edited by Professors Schwarzenberger and Keeton, follows a recognizable and useful pattern. It contains two theoretical articles, in one of which Dr. Schwarzenberger regards state sovereignty and sovereign equality as symptoms of a reality which they disguise, and which are dangerous because they lead to self-deception. Professor Corbett sees little hope in the International Law Commission and thinks that the main progress of the law of nations will be in the "cautious accumulation of international organizations with specific tasks."

Professor Gordon Ireland's article so strongly attacks the International Military Tribunal of the Far East, both as to persons and procedures, that it must have aroused some apprehension in the minds of the editors. It is a revealing article and, since its tone causes one to read it with caution, they were probably justified in publishing it.

Another uninhibited article is that by Susan Strange on "Truman's Point Four," with the accent on Truman. She does not hesitate to criticize, but with sound judgment. She suggests that integration is needed in the technical assistance work, and that if this work were done through the United Nations it would offer the United States some defense against the charge of imperialism.

Other general articles are written by Franz Heske on Forestry as an International Problem, C. Alexandrowicz on the Study of International Economics, and J. D. Krivine on the European Recovery Programme. There are also a number of regional studies: The British Commonwealth and its Members, by H. Shearman; The Post-War Treaties of the Soviet Union, by L. B. Schapiro; Italy since the War, by T. Gibson; The Free Territory of Trieste under the United Nations, by Hans Kelsen; and The Danube, by H. A. Smith. Finally, there is an admirable section entitled "World Reports" which, by means of reviews of current books, gives a picture of the literature and current problems of the world today.

CLYDE EAGLETON

Foreign Relations of the United States, 1933. By the Department of State. Washington: Government Printing Office, 1949-1950. Vol. I: pp. xcviii, 1012, \$3.75; Vol. II: pp. c, 1032, \$3.50; Vol. III: pp. xcviii, 794, \$2.75; Vol. IV: pp. lxxxiv, 812, \$3.00. Index in each volume. In these days of acute international difficulties it seems a little difficult to secure attention for even the equally acute events of 1933. In this case, moreover, the explanation hardly seems to lie in the seventeen-year gap between the actions concerned and publication of the record. Be that as it may, all students of international relations and United States foreign policy will find enormous segments of relevant material in these volumes, the first of which deals with *General* problems (Disarmament, London Monetary Conference, Intergovernmental Debts, and other matters); the second with the *British Commonwealth, Europe, the Near East, and Africa*; the third with the *Far East*; and the last with the *American Republics*. The editing and presentation are uniform with previous volumes in this series.

P. B. P.

Last Call for Common Sense. By James P. Warburg. New York: Harcourt, Brace and Co., 1949. pp. viii, 312. Appendices. \$3.00. Once again the prolific pen of James Warburg sounds a call for a change in American foreign policy. Written primarily for the layman rather than the scholar, this book is comprised of speeches made and memoranda prepared by the author in the crucial year 1948. He views the "cold war" as the product of American negativism and urges a more positive policy with emphasis upon economic reconstruction and political recovery. Unlike most critics of the Marshall Plan, the North Atlantic Pact, and our present German policy, Warburg attempts to enunciate alternative proposals which contain considerable common sense.

Two basic theses permeate the text: (1) that the primary threat to peace is not military but political and economic, and (2) that the ultimate solution requires the "establishment of a world organization capable of enacting, administering and enforcing world law." The author's fundamental fear appears to be that, by virtue of our fumbling policy, "we have

left to the Soviet Union the exploitation of the world wide aspiration for a new and better future."

Citing as evidence the American maneuvers at the time of the Berlin blockade, the author contends that the "cold war," which began as a means for effecting a peace settlement, has now become an end in itself. While declaring that American policy is conceived primarily by military minds and based upon a military view of national security, Warburg omits an analysis of the incidence of the military considerations and military force that underlie Soviet policy. He vitiates an otherwise penetrating analysis by such categorical statements as "war is worse than Russian communism" (p. 94), and that there is "actually no real clash of vital interests between the Soviet Union and the United States" (p. 74).

Furthermore, the author's arguments in favor of world government are hardly compatible with his denunciation of the North Atlantic Pact on the basis that "it pretends to have a common heritage of ethical belief and 'democratic' principle with all the nations" (p. 228) in the alliance, which Warburg denies. His realism gives way to enthusiasm when he asserts that in order to join the world federation the Soviets "would not have to abandon Marxism or the belief in communist totalitarianism *within*" (p. 124).

In urging a comprehensive reëxamination of American policy the author is on sound ground, though he oversimplifies his constructive suggestions by the assumption that the United States can project a more progressive and enlightened policy abroad than it legislates at home. A copious appendix contains the texts of the Ruhr Authority Agreement, the North Atlantic Treaty and other valuable source material.

ALFRED J. HOTZ

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* Mention here neither assures nor precludes later review.

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UNITING FOR PEACE

RESOLUTIONS ADOPTED BY THE UNITED NATIONS GENERAL ASSEMBLY
AT ITS 302ND PLENARY MEETING, NOVEMBER 3, 1950¹

RESOLUTION A

The General Assembly,

Recognizing that the first two stated Purposes of the United Nations are:

“To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”, and

“To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”,

Reaffirming that it remains the primary duty of all Members of the United Nations, when involved in an international dispute, to seek settlement of such a dispute by peaceful means through the procedures laid down in Chapter VI of the Charter, and recalling the successful achievements of the United Nations in this regard on a number of previous occasions,

Finding that international tension exists on a dangerous scale,

Recalling its resolution 290 (IV) entitled “Essentials of peace”, which states that disregard of the Principles of the Charter of the United Nations is primarily responsible for the continuance of international tension, and desiring to contribute further to the objectives of that resolution,

Reaffirming the importance of the exercise by the Security Council of its primary responsibility for the maintenance of international peace and security, and the duty of the permanent members to seek unanimity and to exercise restraint in the use of the veto,

Reaffirming that the initiative in negotiating the agreements for armed forces provided for in Article 43 of the Charter belongs to the Security Council, and desiring to ensure that, pending the conclusion of such agreements, the United Nations has at its disposal means for maintaining international peace and security,

Conscious that failure of the Security Council to discharge its responsibilities on behalf of all the Member States, particularly those responsi-

¹ U. N. General Assembly, Fifth Session. Doc. A/1481, Nov. 4, 1950.

bilities referred to in the two preceding paragraphs, does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security,

Recognizing in particular that such failure does not deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security,

Recognizing that discharge by the General Assembly of its responsibilities in these respects calls for possibilities of observation which would ascertain the facts and expose aggressors; for the existence of armed forces which could be used collectively; and for the possibility of timely recommendation by the General Assembly to Members of the United Nations for collective action which, to be effective, should be prompt.

A.

1. *Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations;

2. *Adopts* for this purpose the amendments to its rules of procedure set forth in the annex to the present resolution;

B.

3. *Establishes* a Peace Observation Commission which, for the calendar years 1951 and 1952, shall be composed of fourteen Members, namely: China, Colombia, Czechoslovakia, France, India, Iraq, Israel, New Zealand, Pakistan, Sweden, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and Uruguay, and which could observe and report on the situation in any area where there exists international tension the continuance of which is likely to endanger the maintenance of international peace and security. Upon the invitation or with the consent of the State into whose territory the Commission would go, the General Assembly, or the Interim Committee when the Assembly is not in session, may utilize the Commission

if the Security Council is not exercising the functions assigned to it by the Charter with respect to the matter in question. Decisions to utilize the Commission shall be made on the affirmative vote of two-thirds of the members present and voting. The Security Council may also utilize the Commission in accordance with its authority under the Charter;

4. *The Commission shall have* authority in its discretion to appoint sub-commissions and to utilize the services of observers to assist it in the performance of its functions;

5. *Recommends* to all governments and authorities that they co-operate with the Commission and assist it in the performance of its functions;

6. *Requests* the Secretary-General to provide the necessary staff and facilities, utilizing, where directed by the Commission, the United Nations Panel of Field Observers envisaged in General Assembly resolution 297 B (IV);

C.

7. *Invites* each Member of the United Nations to survey its resources in order to determine the nature and scope of the assistance it may be in a position to render in support of any recommendations of the Security Council or of the General Assembly for the restoration of international peace and security;

8. *Recommends* to the States Members of the United Nations that each Member maintain within its national armed forces elements so trained, organized and equipped that they could promptly be made available, in accordance with its constitutional processes, for service as a United Nations unit or units, upon recommendation by the Security Council or General Assembly, without prejudice to the use of such elements in exercise of the right of individual or collective self-defense recognized in Article 51 of the Charter;

9. *Invites* the Members of the United Nations to inform the Collective Measures Committee provided for in paragraph 11 as soon as possible of the measures taken in implementation of the preceding paragraph;

10. *Requests* the Secretary-General to appoint, with the approval of the Committee provided for in paragraph 11, a panel of military experts who could be made available, on request, to Member States wishing to obtain technical advice regarding the organization, training, and equipment for prompt service as United Nations units of the elements referred to in paragraph 8;

D.

11. *Establishes* a Collective Measures Committee consisting of fourteen Members, namely: Australia, Belgium, Brazil, Burma, Canada, Egypt, France, Mexico, Philippines, Turkey, the United Kingdom of Great Britain and North Ireland, the United States of America, Venezuela and Yugo-

slavia, and directs the Committee, in consultation with the Secretary-General and with such Member States as the Committee finds appropriate, to study and make a report to the Security Council and the General Assembly, not later than 1 September 1951, on methods, including those in Section C of the present resolution, which might be used to maintain and strengthen international peace and security in accordance with the Purposes and Principles of the Charter, taking account of collective self-defense and regional arrangements (Articles 51 and 52 of the Charter);

12. *Recommends* to all Member States that they co-operate with the Committee and assist it in the performance of its functions;

13. *Requests* the Secretary-General to furnish the staff and facilities necessary for the effective accomplishment of the purposes set forth in sections C and D of the present resolution;

E.

14. *The General Assembly*, in adopting the proposals set forth above, is fully conscious that enduring peace will not be secured solely by collective security arrangements against breaches of international peace and acts of aggression, but that a genuine and lasting peace depends also upon the observance of all the Principles and Purposes established in the Charter of the United Nations, upon the implementation of the resolutions of the Security Council, the General Assembly and other principal organs of the United Nations intended to achieve the maintenance of international peace and security, and especially upon respect for and observance of human rights and fundamental freedoms for all and on the establishment and maintenance of conditions of economic and social well-being in all countries; and accordingly

15. *Urges* Member States to respect fully, and to intensify, joint action, in co-operation with the United Nations, to develop and stimulate universal respect for and observance of human rights and fundamental freedoms, and to intensify individual and collective efforts to achieve conditions of economic stability and social progress, particularly through the development of under-developed countries and areas.

ANNEX

The rules of procedure of the General Assembly are amended in the following respects:

1. The present text of rule 8 shall become paragraph (a) of that rule, and a new paragraph (b) shall be added to read as follows:

“Emergency special sessions pursuant to resolution —(V) shall be convened within twenty-four hours of the receipt by the Secretary-Gen-

eral of a request for such a session from the Security Council, on the vote of any seven members thereof, or of a request from a majority of the Members of the United Nations expressed by a vote in the Interim Committee or otherwise, or of the concurrence of a majority of Members as provided in rule 9."

2. The present text of rule 9 shall become paragraph (a) of that rule and a new paragraph (b) shall be added to read as follows:

"This rule shall apply also to a request by any Member for an emergency special session pursuant to resolution ——(V). In such a case the Secretary-General shall communicate with other Members by the most expeditious means of communication available."

3. Rule 10 is amended by adding at the end thereof the following:

"In the case of an emergency special session convened pursuant to rule 8 (b), the Secretary-General shall notify the Members of the United Nations at least twelve hours in advance of the opening of the session."

4. Rule 16 is amended by adding at the end thereof the following:

"The provisional agenda of an emergency special session shall be communicated to the Members of the United Nations simultaneously with the communication summoning the session."

5. Rule 19 is amended by adding at the end thereof the following:

"During an emergency special session additional items concerning the matters dealt with in resolution ——(V) may be added to the agenda by a two-thirds majority of the Members present and voting."

6. There is added a new rule to precede rule 65 to read as follows:

"Notwithstanding the provisions of any other rule and unless the General Assembly decides otherwise, the Assembly in case of an emergency special session, shall convene in plenary session only and proceed directly to consider the item proposed for consideration in the request for the holding of the session, without previous reference to the General Committee or to any other Committee; the President and Vice-Presidents for such emergency special sessions shall be, respectively, the Chairman of those delegations from which were elected the President and Vice-Presidents of the previous session."

RESOLUTION B

For the purpose of maintaining international peace and security, in accordance with the Charter of the United Nations, and, in particular, with Chapters V, VI and VII of the Charter,

The General Assembly

Recommends to the Security Council:

That it should take the necessary steps to ensure that the action provided for under the Charter is taken with respect to threats to the peace, breaches of the peace or acts of aggression and with respect to the peaceful settlement of disputes or situations likely to endanger the maintenance of international peace and security;

That it should devise measures for the earliest application of Articles 43, 45, 46 and 47 of the Charter of the United Nations regarding the placing of armed forces at the disposal of the Security Council by the States Members of the United Nations and the effective functioning of the Military Staff Committee.

The above dispositions should in no manner prevent the General Assembly from fulfilling its functions under resolution ——(V).

RESOLUTION C*The General Assembly,*

Recognizing that the primary function of the United Nations Organization is to maintain and promote peace, security and justice among all nations,

Recognizing the responsibility of all Member States to promote the cause of international peace in accordance with their obligations as provided in the Charter,

Recognizing that the Charter charges the Security Council with the primary responsibility for maintaining international peace and security,

Reaffirming the importance of unanimity among the permanent members of the Security Council on all problems which are likely to threaten world peace,

Recalling General Assembly resolution 190 (III) entitled "Appeal to the Great Powers to renew their efforts to compose their differences and establish a lasting peace",

Recommends to the permanent members of the Security Council that:

(a) They meet and discuss, collectively or otherwise, and, if necessary, with other States concerned, all problems which are likely to threaten international peace and hamper the activities of the United Nations, with a view to their resolving fundamental differences and reaching agreement in accordance with the spirit and letter of the Charter;

(b) They advise the General Assembly and, when it is not in session, the Members of the United Nations, as soon as appropriate, of the results of their consultations.

CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

ADOPTED BY THE UNITED NATIONS GENERAL ASSEMBLY, DECEMBER 9, 1948¹

In force January 12, 1951

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

Recognizing that at all periods of history genocide has inflicted great losses on humanity; and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required;

Hereby agree as hereinafter provided:

ARTICLE I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

ARTICLE II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

¹ U. N. General Assembly, Third Sess., Pt. I, Official Records, Resolutions (Doc. A/810, Dec. 1948), p. 174. As of Oct. 14, 1950, twenty-four states had deposited instruments of ratification or accession. *Ratifications*: Australia, Ecuador, El Salvador, Ethiopia, France, Guatemala, Haiti, Iceland, Israel, Liberia, Norway, Panama, Philippines (with reservations), Yugoslavia. *Accessions*: Bulgaria (with reservations), Cambodia, Ceylon, Costa Rica, Hashemite Kingdom of Jordan, Republic of Korea, Monaco, Saudi Arabia, Turkey and Viet-Nam. For reservations of Bulgaria and the Philippines, see below, pp. 11, 12.

ARTICLE III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

ARTICLE IV

Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

ARTICLE V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.

ARTICLE VI

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

ARTICLE VII

Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

ARTICLE VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.

ARTICLE IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those re-

lating to the responsibility of a State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

ARTICLE X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

ARTICLE XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE XII

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

ARTICLE XIII

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a *procès-verbal* and transmit a copy of it to each Member of the United Nations and to each of the non-member States contemplated in Article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

ARTICLE XIV

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

ARTICLE XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

ARTICLE XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

ARTICLE XVII

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in Article XI of the following:

- (a) Signatures, ratifications and accessions received in accordance with Article XI;
- (b) Notifications received in accordance with Article XII;
- (c) The date upon which the present Convention comes into force in accordance with Article XIII;
- (d) Denunciations received in accordance with Article XIV;
- (e) The abrogation of the Convention in accordance with Article XV;
- (f) Notifications received in accordance with Article XVI.

ARTICLE XVIII

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to all Members of the United Nations and to the non-member States contemplated in Article XI.

ARTICLE XIX

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

RESERVATIONS

THE PRESIDUM OF THE NATIONAL ASSEMBLY OF THE
PEOPLE'S REPUBLIC OF BULGARIA

HAVING SEEN AND EXAMINED the Convention of 9 December 1948 on the Prevention and Punishment of the crime of Genocide,

CONFIRMS its accession to this Convention with the following reservations:

1. *As regards Article IX:* The People's Republic of Bulgaria does not consider as binding upon itself the provisions of Article IX which provides that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the People's Republic of Bulgaria will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.
2. *As regards Article XII:* The People's Republic of Bulgaria declares that it is not in agreement with Article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories.¹

AND DECLARES its assurance of the application thereof.

IN FAITH WHEREOF, has signed the present instrument and has had affixed the seal of the State thereto.

GIVEN at Sofia, on 12 July one thousand nine hundred and fifty.

THE PRESIDENT:

(Illegible)

THE SECRETARY:

(Illegible)

THE MINISTER FOR FOREIGN AFFAIRS:

M. Neitcheff

Translation by the Secretariat

[signed] A. H. Feller

General Counsel and Principal Director

Legal Department

¹ Identical reservations were made in special *procès-verbaux* by the U.S.S.R., the Ukrainian S.S.R. and the Byelorussian S.S.R. when the convention was signed on their behalf on Dec. 16, 1949, and by Czechoslovakia when the convention was signed on its behalf on December 28, 1949. See this JOURNAL, Vol. 44 (1950), p. 128.

MALACANAN PALACE
MANILLA

BY THE PRESIDENT OF THE PHILIPPINES

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

WHEREAS, The Convention on the Prevention and Punishment of the Crime of Genocide was approved by the General Assembly of the United Nations during its Third Session on December 9, 1948, and was signed by the authorized representative of the Philippines on December 11, 1948;

WHEREAS, Article XI of the Convention provides that the present Convention shall be ratified and the instruments of ratification deposited with the Secretary-General of the United Nations; and

WHEREAS, the Senate of the Philippines, by its Resolution No. 9, adopted on February 28, 1950, concurred in the ratification by the President of the Philippines of the aforesaid Convention in accordance with the Constitution of the Philippines, subject to the following reservations:

"1. With reference to Article IV of the Convention, the Philippine Government cannot sanction any situation which would subject its Head of State, who is not a ruler, to conditions less favorable than those accorded other Heads of State, whether constitutionally responsible rulers or not. The Philippine Government does not consider said Article, therefore, as overriding the existing immunities from judicial processes guaranteed certain public officials by the Constitution of the Philippines.

"2. With reference to Article VII of the Convention, the Philippine Government does not undertake to give effect to said Article until the Congress of the Philippines has enacted the necessary legislation defining and punishing the crime of genocide, which legislation, under the Constitution of the Philippines, cannot have any retroactive effect.

"3. With reference to Articles VI and IX of the Convention, the Philippine Government takes the position that nothing contained in said Articles shall be construed as depriving Philippine courts of jurisdiction over all cases of genocide committed within Philippine territory save only in those cases where the Philippine Government consents to have the decision of the Philippine courts reviewed by either of the international tribunals referred to in said Articles. With further reference to Article IX of the Convention, the Philippine Government does not consider said Article to extend the concept of State responsibility beyond that recognized by the generally accepted principles of international law."

NOW, THEREFORE, be it known that I, ELPIDIO QUIRINO, President of the Philippines, after having seen and considered the said Convention, do hereby, in pursuance of the aforesaid concurrence of the Senate

and subject to the reservations above-quoted, ratify and confirm the same and every article and clause thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Republic of the Philippines to be affixed.

Done in the City of Manila, this 23rd day of June, in the year of Our Lord, nineteen hundred and fifty, and of the Independence of the Philippines, the fourth.

(signed) QUIRINO

By the President:

(signed)

FELINO NERI

Undersecretary of Foreign Affairs

Certified true copy

[signed] A. H. Feller

General Counsel and Principal Director

Legal Department

NOTE: In view of the above reservations to the Genocide Convention as well as those made by some states at the time of their signature, and of the objections made to such reservations by some parties to the Convention, the Secretary General of the United Nations placed the question of reservations to multilateral conventions before the Fifth Session of the General Assembly in a report on the subject, calling particular attention to the reservations to the Genocide Convention. Upon the recommendation of the Sixth Committee of the General Assembly, the following resolution was adopted by the Assembly:

RESERVATIONS TO MULTILATERAL CONVENTIONS

RESOLUTION ADOPTED BY THE UNITED NATIONS GENERAL ASSEMBLY AT ITS 305TH PLENARY MEETING ON NOVEMBER 16, 1950¹

The General Assembly,

Having examined the report of the Secretary-General regarding reservations to multilateral conventions,

Considering that certain reservations to the Convention on the Prevention and Punishment of the Crime of Genocide have been objected to by some States,

Considering that the International Law Commission is studying the whole subject of the law of treaties, including the question of reservations,

Considering that different views regarding reservations have been expressed during the fifth session of the General Assembly, and particularly in the Sixth Committee,

¹ U. N. General Assembly, Fifth Session. Doc. A/1517, Nov. 17, 1950.

1. *Requests* the International Court of Justice to give an advisory opinion on the following questions:

"In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification:

"I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

"II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving State and:

(a) The parties which object to the reservation?

(b) Those which accept it?

"III. What would be the legal effect as regards the answer to question I if an objection to a reservation is made:

(a) By a signatory which has not yet ratified?

(b) By a State entitled to sign or accede but which has not yet done so?"

2. *Invites* the International Law Commission:

(a) In the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law; to give priority to this study and to report thereon, especially as regards multilateral conventions of which the Secretary-General is the depositary, this report to be considered by the General Assembly at its sixth session;

(b) In connexion with this study, to take account of all the views expressed during the fifth session of the General Assembly, and particularly in the Sixth Committee;

3. *Instructs* the Secretary-General, pending the rendering of the advisory opinion by the International Court of Justice, the receipt of a report from the International Law Commission and further action by the General Assembly, to follow his prior practice with respect to the receipt of reservations to conventions and with respect to the notification and solicitation of approvals thereof, all without prejudice to the legal effect of objections to reservations to conventions as it may be recommended by the General Assembly at its sixth session.

AMERICAN JOURNAL OF INTERNATIONAL LAW

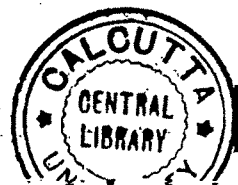
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THE LEGAL STATUS OF SUBMARINE AREAS BENEATH THE HIGH SEAS

BY RICHARD YOUNG

Harvard University Law School

The increasing number of claims by various states to submarine areas beneath the high seas has recently raised anew the question of the status of such claims in international law. The importance of the problem, with its possible impact on traditional legal concepts, has attracted the attention of writers and of several bodies interested in the development of international law, including the International Law Commission of the United Nations. It is to be hoped that out of the present ferment will emerge some sound legal principles which will reconcile new needs with established patterns in such a manner as to win general assent. To this end it may be useful, now that there are some years of state practice and learned discussion to draw upon, to comment on various views that have been advanced.

According to the latest information available to the writer, some thirty governments have put forward claims to jurisdiction over submarine areas lying beyond the traditional limits of their territorial waters. In the Western Hemisphere, claims have been made by at least thirteen of the American Republics and by four British colonies;¹ in the Far East, by the Philippines;² and in the Middle East by Pakistan, Saudi Arabia, and nine Persian Gulf sheikhdoms under British protection.³ In an action directed solely to fisheries, Iceland has claimed the right to take conservation measures within the limits of the continental shelf.⁴ Similar action with respect to Greenland and the Faeroe Islands has been under study in

¹ Argentina (1946), Brazil (1950), Chile (1947), Costa Rica (1948), El Salvador (1950), Guatemala (1948), Honduras (1950), Mexico (1945), Nicaragua (1948), Panama (1946), Peru (1947), the United States (1945), Venezuela (1942); and the Bahamas (1948), British Honduras (1950), Jamaica (1948), and Trinidad (1942). See Richard Young, "The Continental Shelf in the Practice of American States," to appear in *Inter-American Juridical Yearbook*, Vol. 3 (1950).

² Petroleum Act of 1949, No. 387, approved June 18, 1949. *Official Gazette*, Vol. 45 (August, 1949), p. 3192.

³ Pakistan, Decree of March 9, 1950, incorporating the continental shelf within the 100-fathom line in the national territory. *Gazette*, March 14, 1950. For Persian Gulf developments, see this *JOURNAL*, Vol. 43 (1949), pp. 530, 790; *ibid.*, Supp., pp. 156, 185.

⁴ Law No. 44 of April 5, 1948.

Denmark.⁵ Legislation advancing claims has also been pending at various times in Cuba and Iran, but apparently has not been enacted.⁶

The International Law Commission took up the problem of submarine areas in connection with its study of the regime of the high seas during its second session at Geneva in the summer of 1950. In anticipation of this meeting, elaborate materials were prepared in the United Nations Secretariat, and the Commission's *rapporteur* on high seas, Professor J. P. A. François, also reviewed the problem in his report.⁷ The Commission devoted most of four sittings to the subject of submarine areas and the continental shelf, and varying points of view were expressed at some length. The consensus of a majority of the Commission was ultimately to the effect that a coastal state was entitled to exercise control and jurisdiction over submarine areas outside its territorial waters with a view to exploring and exploiting the natural resources; such an area should be limited in extent, but should not be dependent on the existence of a continental shelf. As summarized in the Commission's report to the General Assembly,

. . . the sea-bed and subsoil of the submarine areas above referred to were not to be considered as either *res nullius* or *res communis*. The sea-bed and subsoil were subject to the exercise, by the littoral States, of control and jurisdiction for the purposes of their exploration and exploitation. The exercise of such control and jurisdiction was independent of the concept of occupation. There could be no question of such right of control and jurisdiction over the waters covering those parts of the sea-bed. Those waters remained under the regime of the high seas. . . . The Commission considered that protection of the resources of the sea should be independent of the concept of the continental shelf.⁸

The *rapporteur* was requested to submit a further report, to include concrete proposals based on these views, at the next session of the Commission.

The subject of submarine areas also has taken a prominent place during the past year on the agenda of the International Law Association. At the

⁵ Paul Fischer, "*Højhedsretten over den kontinentale sokkel*," *Jus Gentium*, Vol. 1 (1949), pp. 190-191; Georg Cohn, "*Den kontinentale sokkel*," *ibid.*, Vol. 2 (1950), pp. 21-31.

⁶ A comprehensive tabular summary of offshore claims appears in S. W. Boggs, "National Claims in Adjacent Seas," *Geographical Review*, April, 1951, p. 185.

⁷ J. P. A. François, Report on the High Seas, U.N. Doc. A/CN.4/17 (March 17, 1950), pp. 31-41; Bibliography on the Regime of the High Seas (prepared by the Secretariat), U.N. Doc. A/CN.4/26 (April 25, 1950), pp. 18-20; Memorandum on the Regime of the High Seas (prepared by the Secretariat), U.N. Doc. A/CN.4/32 (July 14, 1950), pp. 48-112.

⁸ Report of the International Law Commission, 2d Session (1950). General Assembly, 5th Sess., Official Records, Supp. No. 12 (Doc. A/1316), p. 22; also in this JOURNAL, Supp., Vol. 44 (1950), p. 148. Accounts of the Commission's discussions on submarine areas appear in the Summary Records, 66th, 67th, 68th, and 69th Meetings, U.N. Docs. A/CN.4/SR.66-69 (July 12-17, 1950).

1950 conference of the Association at Copenhagen, stimulating reports were submitted by a committee of which Mr. P. R. Feith was *rapporteur*, and also by the French Branch of the Association. Discussions at the conference were largely exploratory in character, avoiding definite conclusions, and at their end the topic was again referred to the committee for further study.

In this discussion the term "submarine areas" is used to mean the bed of the sea and the subsoil outside of territorial waters.⁹ It is a more accurate general term than "continental shelf" for the areas which require consideration. On the one hand, it excludes that landward portion of the continental shelf lying within territorial waters and subject to their regime; on the other, it includes areas not properly described as continental shelf, such as insular shelves and the sea bed and subsoil beneath shallow seas and gulfs in which no shelf edge exists. The term is compound in character, covering both sea bed and subsoil. Theoretically it is possible to envisage a separation of these two elements, with a different legal regime for each: the resources of the sea bed, such as sedentary fisheries and plant life, might be utilized without affecting the subsoil, and conversely the resources of the subsoil might be tapped by pipes or tunnels from land without disturbing the sea bed. Such a division with respect to property rights is well known, of course, to municipal law. Yet the sea bed and the subsoil are but two aspects of the same thing, and as a practical matter the use of one inevitably becomes entangled in the other. Under these circumstances it would appear more satisfactory to subject both from the outset to the same regime for international purposes.¹⁰

The claims made in recent years disclose considerable diversity despite their common sources. The forerunner was the Gulf of Paria Treaty of 1942 between the United Kingdom and Venezuela, which was strictly limited to submarine areas and made no mention of the continental shelf. The first to make use of that concept in this connection was the United States Presidential Proclamation of September 28, 1945, which announced that the "natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States" were to be regarded as "appertaining to the United States, subject to its

⁹ This is the definition which was employed in the British-Venezuelan Treaty of Feb. 26, 1942, regarding the Submarine Areas of the Gulf of Paria. League of Nations Treaty Series, Vol. 205, p. 121.

¹⁰ In certain cases the existence of established rights, for example in a sedentary fishery, may circumscribe the measure of control exercisable by the state claiming the sea bed and subsoil of a given area. This would appear to be the case with the Persian Gulf pearl fisheries, where the traditional pearling rights enjoyed by all the peoples of the Gulf have been expressly recognized by the several governments claiming the sea bed and subsoil.

jurisdiction and control."¹¹ In subsequent actions by other states this language underwent considerable enlargement. In some, such as Saudi Arabia, the sea bed and subsoil (and not merely the resources therein) were declared subject to jurisdiction and control; in others, such as Nicaragua, they were made part of the national territory or subjected to the national sovereignty; and in still others, such as Chile, Costa Rica, and Peru, large expanses of water (sometimes out to a line 200 miles from shore) were claimed, as well as submarine areas.

Insofar as the claims apply to submarine areas, it would seem unprofitable to speculate on possible shades of meaning in the various phrases used. All have in common a minimum intent to control exclusively the resources of certain areas of sea bed and subsoil; and as a practical matter it would seem impossible to control these resources *in situ* without controlling the sea bed and subsoil which contain them. It would further seem impossible to distinguish in practice such powers of exclusive control from the powers ordinarily summed up in the term "sovereignty." It is true that these powers may be limited upwards (by the level of the sea bed) as well as laterally, but that does not change their character. To say otherwise is to raise also the perplexing question of where else, if anywhere, sovereignty can reside in an area of admittedly exclusive control; and it would seem desirable to avoid unnecessary controversy on so shadowy a question. For such reasons it would appear justifiable to conclude that the various claims now outstanding, whatever their language, amount at the least to assertions of sovereignty over submarine areas.¹² The additional assertions made by some states with respect to water areas and resources in the sea itself are separable from this main thesis and will be considered later.

Assuming then that the current claims to submarine areas are in sub-

¹¹ 10 Fed. Reg. (1945), p. 12303; this JOURNAL, Supp., Vol. 40 (1946), p. 45.

¹² As described above, the U. S. proclamation of 1945 spoke only of "jurisdiction and control" over the "natural resources of the subsoil and sea bed," without reference to sovereignty or title. Yet by 1948 the Federal Government, in suits against the States of Texas and Louisiana, was asking the U. S. Supreme Court to declare that the United States was the "owner in fee simple" of the submarine areas in the Gulf of Mexico there in controversy. The Court declined so to declare, preferring the formula "possessed of paramount rights in, and full dominion and power over, the lands" in question. *U. S. v. Texas* (1950), 339 U. S. 707, this JOURNAL, Vol. 44 (1950), p. 770; *U. S. v. Louisiana* (1950), 339 U. S. 699. Similarly, the British-Venezuelan Treaty of 1942 regarding the Gulf of Paria did not assert the sovereignty of the parties over the submarine areas of the Gulf; but even before the treaty entered into force (Sept. 22, 1942), a British Order in Council of Aug. 6, 1942, "annexed" to "His Majesty's dominions" the areas on the Trinidad side of the treaty line. Statutory Rules and Orders, 1942, Vol. 1, p. 919. Since 1942, in the cases of the Bahamas, Jamaica, and British Honduras, the British practice has been to "extend the boundaries" of each colony to include the contiguous continental shelf. This formula would clearly seem to amount to a claim of sovereignty over the submarine areas concerned. See this JOURNAL, Vol. 43 (1949), p. 790.

stance claims to sovereignty, to what extent are they to be considered valid and on what legal basis are they to rest? From a growing body of literature on the subject,¹³ three principal points of view seem to emerge: (1) that submarine areas are incapable of exclusive appropriation by any state; (2) that submarine areas may be acquired by occupation, which according to some need be only fictitious; (3) that submarine areas are appurtenant to the adjacent land territory and are automatically subject to the sovereignty of the state which holds that territory.

The first contention derives from the theory that the high seas are the common property of all peoples and capable of exclusive acquisition by none. Gidel long ago pointed out the difficulties in this view of the high seas as *res communis*,¹⁴ and it would appear to be still less defensible when extended to submarine areas. Even apart from the questionable validity of the original doctrine, there is no necessary reason why submarine areas should be subjected to the same legal regime as the waters of the high seas. The waters are primarily a highway of commerce, and for this purpose are most useful when open freely to all. Such reasoning fails when applied to submarine areas whose utility is of a wholly different character. Yet this line of thought has given rise to proposals that, since the high seas are the property of the international community, the development of submarine resources beneath them should also be entrusted to the international community.¹⁵ The good intentions behind such proposals cannot make up for their impracticability as a solution to an immediate problem; and indeed it may be doubted whether an international regime would be the most effective means of developing submarine resources, with their multitude of special local problems in all parts of the world. At the present time, to deny any possibility of exclusive interest is to prevent orderly development, perhaps any development at all. So negative a doctrine cannot stand, and the practice of states confirms its rejection.

The second view, for which there seems more to be said, holds that the sea bed and subsoil are, like land territory without a master, *res nullius* until claimed and occupied by some state, which thereupon acquires rights of exclusive control. The familiar modern doctrine is that the occupation

¹³ In addition to the United Nations documents cited in notes 7 and 8 *supra*, reference may be made *inter alia* to: P. R. Feith, "Rights to the Sea Bed and its Subsoil," Report of the 43d Conference of the International Law Association (1948), pp. 168-206; International Law Association, Committee Report and Report of the French Branch to the 44th Conference (1950); Sir Cecil Hurst, "The Continental Shelf," International Law Quarterly, Vol. 2 (1948), pp. 640-642; J. L. de Azcárraga y Bustamante, "Los derechos sobre la plataforma continental," *Revista Española de Derecho Internacional*, Vol. 2 (1949), pp. 47-99; Giovanni Bernardi, "I diritti sul fondo e sul sottofondo dell'alto mare," *Il Diritto Marittimo* (3d ser.), Vol. 51 (1949), pp. 9-20.

¹⁴ Gilbert Gidel, *Le droit international public de la mer*, Vol. 1, pp. 214 ff.

¹⁵ For example, the proposal of Mr. Shuhsi Hsu at the 66th meeting of the International Law Commission (Geneva, July 12, 1950), U.N. Doc. A/CN.4/SR.66, p. 28; and cf. Bernardi, article cited *supra*, note 13.

of land territory must be physical and effective, though the actual degree of control required may vary widely with the circumstances. Applied strictly to submarine areas, this rule would mean that only those areas under actual exploitation could be regarded as being under the exclusive authority of the claiming state. Superficially, this view seems to have the merit of fitting submarine areas into an established legal pigeonhole; but on closer analysis several objections emerge which suggest that it may be an error to assimilate submarine areas to land territory. The most obvious, perhaps, is the difficulty of determining what constitutes effective occupation at the bottom of the sea, and of defining the limits of the occupied areas. It is conceivable that one state might occupy the sea bed and another the subsoil, with ensuing controversy. Still more objectionable is the premium placed by such a rule on "snatch-and-squat" tactics reminiscent of the California gold rush and the Cherokee Strip.

The insuperable objection, however, to any rule based on occupation would appear to be its disregard of the interests of the adjacent coastal state. Rights would vest in the occupant, no matter whence he came or how tenuous his prior connection with the region. A principle which permitted such a situation would rightly seem intolerable to most coastal states, and especially so to one unable to proceed immediately with development on its own account. Considerations of security, of trade and navigation, of pollution, and of customs and revenue, would all militate against recognition of such a doctrine. It is not sufficient to say in reply that a coastal state by forehanded action may place itself in the position of occupant: many coastal states do not have the technical or financial means at hand to win a race for occupation against some other state on the hunt for additional resources.

To meet some of the foregoing objections, the concept of a "notional" occupation has been proposed, permitting a state to stake out by proclamation, in lieu of occupation, the submarine areas to which it lays claim. Coastal states could thereby protect themselves by timely action against unwelcome intrusions. "Notional" occupation, however, does not entirely do away with the problem of a land-grabbing state reaching out for desirable areas remote from its own shores. Also, by making a state's unilateral declaration an essential element, it may appear to sanction unlimited power in the declaring state to decide the scope and nature of its claims. It further reintroduces into international law the idea of fictitious occupation as a valid basis of title. That concept, found by experience to be a fertile breeder of controversy, has been largely rejected in modern times, save perhaps for the polar regions. The wisdom of readmitting it with respect to submarine areas is at least questionable. To insist that occupation is necessary under a general rule, and then to admit a spurious occupation as sufficient, is devious reasoning. The necessity of a fiction strongly suggests that the problem is in the wrong pigeonhole, and that claims to submarine areas require different treatment from claims to land territory.

The third view noted above is to regard the submarine areas contiguous to the coasts of a state as being appurtenant to that state by automatic attribution of law and without any requirement of occupation, either real or fictitious. On such a theory a declaration is not essential to establish a state's position off its shores, though such an instrument may serve a useful purpose by way of giving precision and notoriety to a state's claims. This view has sometimes been justified, by those who fear that appurtenance alone cannot support a claim to submarine areas, on a special interpretation of the principle of accretion. It is said that theoretically such areas could be dyked and drained, and would then be indisputably part of the coastal state; and that this possibility should be taken in law as equivalent to accretion in fact.¹⁶ The strained character of such reasoning is plain, and arises from the misapprehension that submarine areas are analogous to land territory and must be acquired by similar methods.

One may suggest, however, that the true analogy is not between submarine areas and land territory, but between submarine areas and territorial waters. On principles quite distinct from those dealing with the acquisition of territory, international law automatically assigns to every coastal state a marginal belt off its shores, within which the state is sovereign (subject only to the right of innocent passage) over subsoil, sea bed, waters, and airspace.¹⁷ A state is not required to "occupy" its territorial waters or even to proclaim them; they are an "inseparable appurtenance."¹⁸ By the present view, similar principles would apply to submarine areas outside of territorial waters. The sea bed and subsoil in such areas would thus be placed on precisely the same footing as the sea bed and subsoil within territorial waters, although the regime of the sea and airspace above would, of course, be different.

Along with difficulties which are considered later, the concept of appurtenance presents a number of advantages over other theories. In the political field its attribution of submarine areas to the contiguous coastal state prevents encroachment by more remote states in regions where the coastal state may justly be sensitive about its interests. At the same time, the requirement of appurtenance provides in some degree a safeguard against extravagant claims by a coastal state dazzled with the vistas off its shores. By eliminating the requirement of occupation, the theory makes unneces-

¹⁶ Such a view was advanced by Mr. P. R. Feith before the International Law Association at Brussels in 1948. Report of the 43d Conference, p. 174.

¹⁷ Although this proposition has been in the past the subject of much debate, it would seem today to admit of no serious doubt.

¹⁸ As was said by a tribunal of the Permanent Court of Arbitration in the *Grisbadarna* Case. Scott, *Hague Court Reports*, p. 127. In the words of Secretary of State Seward in 1863, a sovereign's right to jurisdiction over the marginal sea "is derived not from his own decree but from the law of nations, and exists even though he may never have proclaimed or asserted it by any decree or declaration whatsoever." Moore, *Digest of International Law*, Vol. 1, p. 710.

sary either a scramble for physical possession or a fictitious taking by proclamation. And by equating rights over submarine areas outside of territorial waters with rights over the sea bed and subsoil within those waters, it simplifies the applicable regime and makes superfluous any fine-spun distinctions between "sovereignty" and "exclusive jurisdiction and control."

In the economic field the theory allows for the fact that resources in submarine areas will ordinarily be best developed from the adjacent shore, and that the processing and use of such resources must be in most cases intimately associated with the economic life of the coastal state. It also takes account of the fact that there is often an economic as well as a geological relationship between offshore resources and similar resources on the contiguous land. Improper use of one may adversely affect the other, and common sense calls for a single authority to control both. Other geographical and geological considerations likewise show that in many instances appurtenance in law would be no more than recognition of a clear appurtenance in fact. This is plainest, of course, with respect to the continental shelves, which constitute a large part of all important submarine areas; but it seems not unreasonable also to regard the sea bed and subsoil of shallow seas and gulfs as appurtenant to the riparian states.

The theory of appurtenance also appears to be in accord with the language of a majority of the state claims to submarine areas. The United States proclamation of 1945 spoke of the "resources of the continental shelf contiguous to the coasts" as "appertaining to the United States," and the reasons for the claim set forth in the preamble emphasized the connections between the shelf and the adjacent land territory. Later actions by other governments in Latin America and the Persian Gulf stressed similar considerations. In many instances, also, the language used is compatible with the view that the submarine areas concerned were regarded as already appurtenant to the state, and that the proclamation of claim was only declaratory in nature. Thus both the Chilean declaration of 1947 and the Costa Rican decree of 1948 "confirmed" and proclaimed the national sovereignty over submarine areas; and other states, such as Honduras and Nicaragua, have simply listed the continental shelf as one of the elements of the national territory described in their constitutions. None of the various instruments gives any indication that an occupation, either real or fictitious, was regarded as essential to a valid claim.

While the notion may be novel as applied to submarine areas, appurtenance and such cognate concepts as dependency and contiguity have by no means been unknown in international law. Although submarine areas and land territory are not to be lumped together indiscriminately, some of the same considerations may apply to both. Thus it seems not inapposite to recall the words of Sir William Scott in 1805 regarding the mud islands off the mouth of the Mississippi. In finding that these uninhabitable mud-

banks were a "kind of portico to the mainland" which ought by common sense to be United States territory, he relied in part on the principle of alluvium and increment; but he went on to say:

Consider what the consequence would be if lands of this description were not considered as appendant to the mainland, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America! . . . The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to shew, that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.¹⁹

If such islands in 1805 formed a portico to the mainland, adjacent submarine areas may well be regarded in 1951 as a doorstep to which similar considerations should apply.

There are, of course, difficulties to be met under the appurtenance theory, as under any other. On examination most of these prove to be problems of definition, the principal one being the meaning to be attached to the term "appurtenance" itself. In the light of what has been said, it is evident that "appurtenance" is a twofold concept, expressing both a physical and a legal relationship. In the first sense, it is equivalent to contiguity or adjacency; and unless this is present, the legal relationship should not arise. The requirement of physical appurtenance serves the purpose of barring claims to areas not in fact associated with the land territory of the claiming state. It does not determine, however, the outer limits of a contiguous area—the point at which an area is to be regarded as no longer appurtenant. It is in this connection that the concept of the continental shelf may be useful in regions where a continental shelf does in fact exist. Wherever this is true, as in the case of most continental coasts fronting on the great oceans, the limits of appurtenance may reasonably be equated with the limits of the shelf. Yet this conclusion is not a final answer, for the term "continental shelf" itself requires definition. This is not altogether an easy matter, but in view of the number of continental shelf claims, a somewhat extended analysis may be worth while.

The problem of defining the continental shelf is complicated, for a lawyer at least, by the fact that the physical scientists themselves do not appear to be entirely in agreement regarding it. Not only do geographers, geologists, and marine biologists seem to have conceptions which vary somewhat with their professions, but not all geographers, geologists, and biologists seem to agree with others in their own fields. So it is with some hesitation that one ventures the statement that by the continental shelf is commonly

¹⁹ *The Anna* (1805), 5 C. Rob. 373, at 385.

meant the submerged margin of the continent, which slopes gently seaward out to a point where there occurs a marked change in the angle of decline; beyond this point lies the ordinarily steeper "continental slope," leading to the deep ocean floor. The continental shelf is thus a continuation of the continent, and in the relatively shallow waters which cover it are said to flourish most of the important food fishes of the world.²⁰

The edge of the shelf, which is the important feature for boundary purposes, has commonly been spoken of as occurring at the average depth of 100 fathoms (600 feet) or 200 meters (656 feet); and this view has been encouraged by the fact that most maps and charts giving ocean depths indicate one or the other of these lines with a good deal of assurance. Actually the edge of the shelf does not appear to be as simple a phenomenon as the maps might lead one to suppose. In some regions it may lie at depths either more or less than 100 fathoms; in others, the edge may be almost imperceptible; in still others, there may be several shelves and edges, or the submarine terrain may be so confused as to make difficult the location of any continuous line. As a result the fixation of an "edge," even in the scientific world, involves to some extent an arbitrary determination, and it may vary quite understandably in accordance with the standards by which the determination is made. From one point of view it may reasonably be contended that the Caspian and the Black Seas, and even the Mediterranean, have no true continental shelf, even though they may run to depths much greater than 100 fathoms; yet from another point of view there may be a plain distinction in these seas between the land-bordering shallows and the central depths. Again, in areas where deep waters lie close to shore, as off the Pacific coast of South America, it may be argued that there is a continental shelf in some cases, but one lying much further submerged than average; and the merit of such a contention may once more depend on the particular standards applied to it.

The existence of such uncertainties over the limits of the continental shelf should not be regarded as destroying the validity of the concept for legal purposes.²¹ There are large areas of continental shelf in all parts of the world about which there would probably be little disagreement; and in many cases it may never be necessary to determine with precision the edge of the shelf. Under such circumstances the problem is to select, with due regard for the physical realities and for scientific opinion, an appropriate standard for fixing what one might call the "legal edge." Naturally this

²⁰ Recent scientific discussions of the continental shelf may be found in F. P. Shepard, *Submarine Geology* (1948), and Jacques Bourcart, *Géographie du fond des mers* (1949); and see S. W. Boggs, "National Claims in Adjacent Seas," *Geographical Review*, Vol. 41 (April, 1951), p. 185.

²¹ Reference may perhaps again be made to the analogy of territorial waters, where diversity of practice as to the width of the marginal belt has not affected the universal recognition of the existence of the belt.

selection will involve in some degree an arbitrary judgment as to what is necessary for a workable legal rule, which will be reasonably fair, certain, and uniform in its effect; but in the light of what has been said this would appear unavoidable and unobjectionable.

With these considerations in mind, the following suggestions are put forward as possible standards for defining the "legal edge" of the continental shelf:

1. As a general rule, the seaward limit of the continental shelf should be considered to be the 100-fathom (or 200-meter) line. For the sake of uniformity, this should be the case even when the shelf in fact terminates at a lesser depth.
2. When the submarine terrain creates more than one such line, the outermost 100-fathom contour should be regarded as the limit of the shelf.
3. A possible boundary line should not be regarded as discontinuous merely because it may be interrupted by submarine canyons running out from land. On a principle somewhat analogous to the headland theory for bays, such canyons should be spanned by straight lines connecting the 100-fathom contours. By the same analogy, the permissible length of such lines might be limited to that applied by the coastal state to its bays.
4. Isolated patches of limited size which are over 100 fathoms in depth should be disregarded and absorbed into the shelf area. In narrow or landlocked seas particularly, depressions over 100 fathoms deep which do not connect with the ocean depths or which are of small size in relation to the total area of the sea in question, should be assimilated to the surrounding shallows.

It is fully appreciated that the foregoing principles by no means solve all problems, and that they contain elements of vagueness which may require further elaboration in particular circumstances. At least two obvious difficulties promptly suggest themselves. The first arises in a situation where the actual shelf edge lies seaward of the 100-fathom line, with the shelf running unbroken out to perhaps the 200-fathom line; it would seem unjust to deprive a state arbitrarily of so obvious a part of its continental shelf. In such a case, it has been proposed²² that a state should be permitted to prove itself entitled to the additional area. Too easy an exception to the general rule should not be permitted, but perhaps such an extension might be recognized when the evidence showed no perceptible change of slope in the vicinity of the 100-fathom line, and a definite change at some point substantially further seaward but within a maximum of, say, 250 or 300 fathoms.

The other difficulty arises in the case of a state with a precipitous coastline which gives it no submarine areas to speak of within the 100-fathom limit. Perhaps such a state can show here, somewhat as in the preceding instance, the existence of a shelf at a greater depth. Alternatively, it has

²² In the report of the committee on "Rights to the Sea Bed and Subsoil" to the 1950 Conference of the International Law Association.

been proposed²³ that the coastal state be permitted to exercise continental shelf rights up to a distance of twenty miles offshore, regardless of depth or other factors. Perhaps such a concession would promote acceptance of the continental shelf doctrine by states that have none; yet it in turn creates new difficulties, and it is hardly the function of the law to redress geographical inequities.

A definition of the continental shelf takes care of most but not all submarine areas which may be regarded as appurtenant to land territory. There remain insular shelves and submarine areas in shallow seas where no shelf edge exists. With respect to the former, it would appear not difficult to apply, *mutatis mutandis*, the principles suggested for the continental shelf. Indeed, at least two governments have seen nothing odd in referring formally to the "continental" shelf around island territories.²⁴ The case of an archipelago surrounded by a single shelf would seem to present no special difficulties except in situations where sovereignty within the archipelago is divided and partitioning of the shelf would be required. Islands located on an extension of the continental shelf, for example, the British Isles, would have no separate insular shelf of their own, and in some such cases also a partition arrangement between mainland and island states might be necessary.

Submarine areas in shallow seas or gulfs—such as the Baltic, the Persian Gulf, and the Gulf of Paria—present perhaps the most difficult situation of all. In addition to due regard for the interests of adjoining states lying along the same coast, the interests of all states facing on such a body of water must be taken into account. In the absence of any large area lying beyond the 100-fathom line—such as is found in the narrow but deep Red Sea—the entire bed and subsoil must be divided equitably among the littoral states. (On an appurtenance theory, of course, no non-littoral state would be entitled to a share.) The absence of a shelf edge makes meaningless a claim to the "continental shelf" in such waters, and this is the obvious objection to the proposed Iranian legislation of 1949 which would have claimed the continental shelf in the Persian Gulf. The actions of the other Persian Gulf states appear to have shown a more accurate understanding of the situation, for they uniformly claimed as appurtenant the sea bed and subsoil contiguous to their coasts and within boundaries to be mutually agreed upon.²⁵

²³ In the report to the 1950 Conference of the International Law Association made by the French Branch of the Association.

²⁴ See the Icelandic law of 1948, cited *supra*, note 4, and the claims to the "continental shelf" around Jamaica and the Bahamas advanced by British Orders in Council of Nov. 26, 1948, cited *supra*, note 12. Many Latin-American claims have distinguished between the two types of shelf. The Philippine Petroleum Act of 1949, cited *supra*, note 2, speaks of "the continental shelf, or its analogue in an archipelago."

²⁵ See citations *supra*, note 3. The Iranian proposal, it may be noted, was expressly applicable to the Persian Gulf and the Sea of Oman, in the latter of which there is a continental shelf. It did not refer to the Caspian.

The lines of division in such cases must almost inevitably be artificial in character, resulting from negotiation and agreement among the interested governments, and it seems difficult to lay down in advance any principles of general application. The chief precedent for such an agreed settlement is the British-Venezuelan Treaty on the Gulf of Paria;²⁶ analogies of value may also be found in treaties establishing water boundaries, such as those dealing with the Great Lakes.²⁷ Numerous problems can be envisaged, such as that of providing fair shares both for an island state and for a mainland state whose coast it masks. These will tax the resourcefulness of diplomats, lawyers, geographers, and engineers, yet none is insoluble if the pressure for settlement is great enough. The situation in a gulf or shallow sea is, indeed, only the most complex among many problems of delimiting and demarcating boundaries for submarine areas; these will call for the careful consideration of geographers and technical experts.²⁸

It has been mentioned earlier that several Latin-American states not only have claimed the sea bed and subsoil off their shores but also have asserted special rights over superjacent water areas as well. These assertions have varied from declarations of control to proclamations of sovereignty over such waters; the waters involved have been defined usually to be those above the continental shelf, but in a number of instances they have been declared to be those within an arbitrary line drawn 200 miles seaward from, and parallel to, the coast. The motives behind these claims have been for the most part understandable and commendable, the most important being the desire to protect and conserve offshore fisheries. Some declarations, in announcing this intent regarding fisheries and marine resources, have expressly recognized rights of free navigation; in a few instances this recognition is said to be conditional on reciprocity.²⁹

However meritorious the reasons for them, it is clear that these assertions move into a sphere where different considerations must be taken into account from those relating to submarine areas. The problem of the law which is to govern submarine areas is in most respects a novel one, with considerable latitude available for its development; but this is not the case

²⁶ Cited *supra*, note 9. The line in this instance, where it did not coincide with the limits of territorial waters, was defined arbitrarily in terms of latitude and longitude.

²⁷ The leading technical discussion of these problems is by S. W. Boggs, *International Boundaries* (1940), pp. 176-192; see also F. A. Vallat, "The Continental Shelf," *British Year Book of International Law*, Vol. 23 (1946), pp. 333-338.

²⁸ See S. W. Boggs, "Delimitation of Seaward Areas under National Jurisdiction," in this JOURNAL, p. 240.

²⁹ The states which appear to have made claims of some kind to water areas in connection with their claims to submarine areas are Argentina, Chile, Costa Rica, El Salvador, Honduras, Peru, and possibly Mexico. See Richard Young, "Recent Developments with Respect to the Continental Shelf," this JOURNAL, Vol. 42 (1948), pp. 849-857, and the article cited *supra*, note 1; also C. B. Selak, Jr., "Recent Developments in High Sea Fisheries Jurisdiction," this JOURNAL, Vol. 44 (1950), pp. 670-681.

with the law of the high seas, which represents a mass of practice and principle accumulated over centuries. Whether this accumulation is wholly adequate to modern needs may well be questioned; but it cannot be summarily disregarded, as certain of these claims appear to do.³⁰ Furthermore, submarine areas are important primarily for their fixed resources, whereas the resources in the sea are neither fixed nor the only reason for its importance. The function of the sea as the world's highway must also be safeguarded. Still another point, important in these times, is the question of airspace. Any doubt cast upon the status of an area as high seas also calls in question the status of the airspace above; it would seem desirable to avoid any such doubt, nonetheless real for having been in all probability not intended by the claimants.

Such points as these indicate the conclusion that the problem of control over submarine resources is different from that over marine resources, and that it is undesirable to try to bring both under the same umbrella. To attempt an extension to water areas of a doctrine suitable for submarine areas is a disservice to proper regulation of both; such overreaching only renders more difficult the acceptance of the doctrine in its proper sphere. This is by no means to say that reforms in the allowable measures of control over marine resources are not necessary or desirable; but they should be worked out on appropriate principles of their own, framed with due regard for the special historical and legal background of the subject. In formulating these principles, it may prove proper to take account of the continental shelf in its aspect as a factor in marine life, as was done in the Icelandic fishery law of 1948; but this is quite different from subjecting marine and submarine resources alike to a single regime.³¹

If on this view there are to be two different regimes in force offshore, one for the waters of the high seas and one for the submarine areas beneath, it will be necessary to work out insofar as possible a harmonious relationship between them. The development of submarine areas will inevitably affect, in varying degrees at different times and places, the use of the sea itself. Development installations will interfere with navigation, and operations may have disturbing effects on fisheries. In such circumstances, no doubt, the state having jurisdiction over the development should be under a duty

³⁰ This point would seem to be supported by the protests addressed by the United Kingdom and the United States to several Latin-American governments, including Chile and Peru, regarding those governments' offshore claims. The protests took exception primarily not to the claims made with respect to submarine areas, but to the rights asserted over adjacent seas. For text of U. S. note to Chile, see Selak, this JOURNAL, Vol. 44 (1950), p. 674.

³¹ The Icelandic law (cited *supra*, note 4) provides for regulation of fisheries within the limits of the continental shelf "only to the extent compatible with agreements with other countries to which Iceland is or may become a party." Thus limited, the Icelandic law seems to go little further than the U. S. proclamation of Sept. 28, 1945, on fishery conservation zones (10 Fed. Reg. (1945), p. 12304).

to see that interference with the traditional uses of the high seas is kept to a reasonable minimum. What constitutes "interference" or a "reasonable minimum," however, may not always be an easy problem to resolve.

In dealing with this question, full account must be taken of the fact that through modern technology the benefits to be derived from the sea and its bed and subsoil may be expected to increase in number and variety; of these benefits the traditionally important uses of the sea for navigation and fisheries are only two. Uncritical insistence on the "freedom of the seas" should therefore not be permitted to force, without further analysis, the abandonment of a submarine development merely because it is claimed to be an interference with traditional uses. In any particular region, the interests at stake should be balanced against each other to determine which is to be preferred. The exploitation of valuable resources should not be hindered, in areas which are in fact of no importance to shipping, only because of an alleged right to navigate freely anywhere on the high seas; just as obstructions should not lightly be permitted in the great highways of ocean trade. Fishery interests should receive similar consideration on their merits; it may be hoped that this will be taken into account in the increasing amount of national and international legislation dealing with fishery protection and control. In many instances, indeed, in perhaps a majority of them, it would seem only reasonable to expect that compromises might be reached which would permit all the different activities concerned to function.

What has been said in the foregoing pages demonstrates some of the numerous problems presented by claims to submarine areas, and sketches broadly some possible lines of future development. It has been suggested that the most satisfactory basis for the claims is to regard submarine areas as appurtenant to the contiguous coastal state in a manner analogous to the appurtenance of territorial waters. After this basic question has been disposed of, however, it has been observed that others, often of considerable difficulty, remain. Chief among these are the problem of determining the legitimate extent of claims to appurtenant areas, including the question of defining the continental shelf; and the problem of harmonizing such claims with the regime of the high seas. In view of the growing number of claims which require reconciliation with each other and with traditional concepts of international law, the need for answers to these problems is obvious. It cannot be doubted that they will be forthcoming, perhaps in the form of international legislation. In this connection the outcome of the deliberations of the International Law Commission will be awaited with great interest.

DELIMITATION OF SEAWARD AREAS UNDER NATIONAL JURISDICTION

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"... Since it is essential that all frontiers, whether on land or at sea, should be certain and definite, all rights which depend for their exercise upon territorial sovereignty must be valid up to a given line and there stop."¹ Very rarely, however, in treaties or in national laws are descriptions of water "boundaries"² sufficiently precise to enable an engineer to lay them down on hydrographic charts, or to "demarcate" them in the waters themselves. About all one can say is that, if the base line is agreed upon, the *outer limit of the territorial sea* is accepted as the envelope of the arcs of circles having a radius of three nautical miles (or any other agreed-upon limit) drawn from all points on the coast. The remark of Professor Riesenfeld may therefore be recalled: "It can probably be said without exaggeration that the law of territorial waters has been one of the most unsatisfactory portions of international law."³

Certainly one of the "most unsatisfactory portions" of the international law relating to the territorial sea is that with regard to the specific limits of the zones of adjacent sea under national jurisdiction. Problems relating to the limits of these zones fall within two categories: (1) Lack of a generally accepted width of the territorial sea—and perhaps of one or more contiguous zones for specific purposes;⁴ and (2) Lack of well-de-

¹ H. A. Smith, *The Law and Custom of the Sea* (London, 1948), p. 17.

² Most lines in water areas which are defined in treaties are not boundaries between waters under the jurisdiction of the contracting parties, but a cartographic device to simplify description of the land areas involved. For example, in the Alaska cession treaty of 1867, the line in Bering Sea and Bering Strait (Art. I) is simply a line to the east of which all land or claim to land was ceded by Russia to the United States. The purpose of such a line as a "line of allocation" of land is explicitly stated in the convention between Great Britain and the United States, January 2, 1930, defining a line between North Borneo and the Philippines (Dept. of State, Treaty Series No. 856; Art. I defines "line separating the islands . . .").

³ Stefan A. Riesenfeld, *Protection of Coastal Fisheries under International Law* (Washington, 1942), p. ix. But with reference to the study of the problem of territorial waters in general, as well as that of the protection of fisheries, on the part of "various institutes, associations, congresses and conferences, particularly those of an international character," see Riesenfeld, *op. cit.*, pp. 99-124.

⁴ An article on "National Claims in Adjacent Seas" by the present writer appears contemporaneously in the *Geographical Review*, April, 1951 (Vol. 41, pp. 185-209). It includes a 10-page table and is accompanied by a world map in color showing which

veloped, acceptable techniques and principles for the delimitation of the belt of territorial sea, or of any contiguous zone or zones required. It is with this lack that the present article is solely concerned.

The fact that there is no adequate world organization or authority dedicated to champion the interests of all the peoples of all states (as a national government normally undertakes actively to seek the best interests of all of its provinces and people) perhaps partly accounts for the recent rash of unilateral actions by individual states. Such actions by various states in recent years are comprehensible as efforts to protect themselves in an age of revolutionary technological developments which have so completely transformed their problems of security, customs control, and conservation of fishing and mineral resources, as to have seemed to them to justify assertions of claims to broad belts of adjacent sea.⁵ But this series of national actions is also due, in part, to a sort of "cartographic chauvinism" and to a desire to "keep up with the Joneses."

Recognition of the fact that the situation has been greatly altered, and that the law must adapt itself to change, is disclosed in such statements as the following by Sir Cecil Hurst:

If the world must have petroleum and petroleum is present in available quantities in the Continental Shelf, and the engineering experts say that from such sources it is a feasible proposition to obtain it, the necessary operations to obtain it will be undertaken. That is the situation which international lawyers must face.⁶

Relatively little has been written on the techniques and principles applicable to the delimitation of boundaries of seaward areas under national jurisdiction.⁷ The writer has found that mere verbal formula-

countries claim a territorial sea of 3-mile, 4-mile, 6-mile, 12-mile width, without or with "contiguous zones," and which countries claim jurisdiction or even sovereignty over a 200-mile belt, or over the difficult-to-define "continental shelf." There is more agreement as to the width of the territorial sea than would at first appear. "At least 79 percent of the merchant shipping tonnage of the world is registered in countries that have subscribed to the 3-mile limit, and another 9.7 percent in Scandinavian countries that claim a 4-mile limit."

The best interests of the world community, it is suggested, may now require: (1) A narrow belt of waters under national sovereignties (leaving wide areas in which free movement is possible, in distant waters and the superjacent airspace); (2) Possible establishment of one or more contiguous zones, of limited jurisdiction for specific purposes, such as: (a) Customs surveillance; (b) Fishing rights and conservation; (c) Mineral resources of the continental shelf; and (d) Security.

⁵ In the article in the *Geographical Review* referred to above, the bearing of these scientific and technological developments is discussed in relation to: (a) security and neutrality; (b) merchant shipping; (c) fishing; (d) mineral exploitation; (e) sanitation, health and water pollution; and (f) air transport.

⁶ "The Continental Shelf," in *Transactions of the Grotius Society*, Vol. 34, p. 159.

⁷ Authors who have written on water boundaries (and who have included maps and illustrations of the methods they describe) include: Vittorio Adami, Paul Fauchille, Paul de Lapradelle, Gilbert Charles Gidel, and Kyösti Haataja.

tion of methods or techniques is prone to be unworkable. Careful analysis of problems disclosed in actual geographical situations which are believed to be representative of the entire range of variation in nature is, in the writer's opinion, essential. As a geographer,⁸ the writer has therefore listed all the categories of boundaries in the adjacent seas which, one may say, are geometrically possible, and has studied each category in relation to several types of coasts and to various problems of different nations. Briefly they are these: (a) Outer limit of the territorial sea; (b) Outer limit of any contiguous zone or zones; (c) Outer limit of inland waters; and (d) Lateral boundaries from the mainland out to the high seas—or to the limit of any contiguous zone or zones. All of these delimitation problems are dealt with systematically in the succeeding pages.⁹

In this article we are concerned only with the questions: "If there is to be a boundary in this water area, where shall it be placed? And how shall it be defined?" The lines with which we are concerned are, in almost all instances, lines that cannot be "demarcated"¹⁰ in the waters to which they relate—by means of buoys, other anchored floating objects, or range marks on shore. Except for occasional initial points on land, usually they can

⁸ H. A. Smith remarks: "It may be that neither sailors nor geographers have been allowed their fair share in the draftings of these [delimitation] documents" (*op. cit.*, p. 12).

⁹ The present article embodies a first attempt to formulate generally acceptable principles and techniques for the delimitation of all types of boundaries of the territorial sea, and of any and all contiguous zones that the world community may desire to recognize or to establish. The writer would not have the temerity to attempt so much of the solution of this complex problem, however, were it not for his firm belief: (1) in the integrity of the universe and its Maker, and in what Benjamin Franklin called "the providence of God in the government of the world" (to be discerned in the emerging possibilities of fulfilling many of the highest aspirations of man if we have the necessary courage, vision, imagination, wit and persistence); (2) in Confucius' rubric, "When the archer misses the center of the target, he turns around and seeks for the cause of his failure within himself"; and (3) in the premise that it is much better, whenever feasible (as in this case), to tackle a problem as a whole instead of piecemeal.

The writer has been intrigued by the phrase "looking out for help" in Justice Cardozo's reference to Haldane who, in his autobiography, noted that "the judges [on the Supreme Tribunals], were keen about first principles and were looking out for help from the advocate." (Selected Writings of Benjamin Nathan Cardozo (New York, 1947), pp. 30-31.) Therefore the hope is entertained that the present article will help, in some degree, to stimulate thinking along constructive lines, to facilitate clear-cut expression of claims, to aid in solving emerging problems, and to narrow the zone of future conflicts.

¹⁰ The distinction between "demarcation" and "delimitation" made by Col. Sir Henry McMahon, which is now generally accepted, is this: "'Delimitation' I have taken to comprise the determination of a boundary line by treaty or otherwise, and its definition in written, verbal terms; 'Demarcation' to comprise the actual laying down of a boundary line on the ground, and its definition by boundary pillars or other similar physical means." See S. W. Boggs, *International Boundaries: A Study of Boundary Functions and Problems*, p. 32, for reference to sources.

only be defined in verbal terms (which should be so clearly stated that they would mean only one specific line to an engineer or a navigator), or represented by means of lines on maps and nautical charts.

The writer never theorizes verbally in these water boundary matters, but tries out hypotheses on actual coasts and therefore on hydrographic charts, because the real geographic situations are more varied than one can imagine.¹¹ He has tested the methods proposed on portions of coasts of all continents and on various islands and archipelagoes where interesting problems seemed to be in the making, or where someone asked that he seek a solution. Within the present necessary space limits the writer therefore seeks to suggest the most workable solution of all types of water delimitation problems in the adjacent seas of which he is aware. In most particulars the techniques go much farther than the policy of any country is believed to have been formulated.

The United States, fortunately, has never attempted on its own coasts to apply any rules, in delimiting its adjacent sea areas, to which it would object if applied by other states on their own coasts. Because the United States is interested in world-wide trade by both sea and air, and would therefore find highly objectionable the narrowing of areas of high seas and superjacent airspace that some others with less world-embracing contacts and interests might wish to impose, the writer hopes that what is here proposed as good doctrine for the world as a whole may be acceptable as good policy for the United States.¹²

Before embarking upon the main enterprise of delimitation principles and techniques it seems necessary to define some terms which are normally employed in relation to the adjacent sea and its sea bed and subsoil, and in defining artificial lines as limits of political jurisdictions.

I. TERMINOLOGY AND DEFINITIONS

Several terms and phrases that are frequently employed, or that should not be utilized, in relation to the adjacent seas and to boundary or jurisdictional lines therein, require definition and discussion.

¹¹ While engaged in writing this article the writer spent several days on surveying ships off the coasts of New Jersey and New York, through the courtesy of the U. S. Coast and Geodetic Survey, to be sure he had escaped from the office-desk viewpoint, to observe the means used in obtaining positions with reference to latitude and longitude shown on sailing charts and to objects visible on shore, and to get the criticism of the ships' commanders regarding the principles and techniques presented in this article, then in draft form.

¹² Although it should be obvious from the context, the writer wishes to make it clear that he alone is responsible for the opinions, viewpoints and proposed solutions of problems in the present article. In discussing the draft manuscript with colleagues and friends he has stressed his desire to write with complete independence, and has invariably met with sympathy and approval in that regard. He appreciates the fact that probably in no other country could a writer in an analogous position present his own views and suggestions so freely.

1. *Territorial Sea and Contiguous Zones*

Territorial sea was recommended in preference to the more common term "territorial waters" in the draft report of the First Sub-Committee [legal] of the "Second Committee" (known as the "Committee on Territorial Waters"), at the 1930 Conference for the Codification of International Law at The Hague. The committee found that "territorial waters" is sometimes used to indicate the sum total of "inland waters" and "territorial waters" in the restricted use of that term.¹³

Marginal sea and *Littoral sea* are widely used terms synonymous with *Territorial Sea* (*Territorial Waters* in the restricted sense).

Contiguous zone(s) and *Adjacent zone(s)* are synonymous terms applied to one or more belts or zones of sea coterminous with the seaward limit of the territorial sea, and extending seaward. Claims to such zones, of either definite or indefinite width, for specific purposes such as customs enforcement and revenue laws, have been asserted by a number of states.

2. *Shorelines, Coasts, and Low-Water Datums*

The general understanding of *shoreline* as the line where land and water meet, of *shore* as the zone between high water and low water, and of *coast* as the broad indeterminate zone landward from the shore, are clear for general purposes.¹⁴ All of these three terms are referred to high water and low water, both of which shift from day to day.

Low-water mark. Although the term is defined in a well-known dictionary as "A line or mark indicating low water," there is no *low-water mark* left by the tide on a seacoast. There is nothing visible which is analogous to the "mark" left by high waters in many areas, by transported sand and debris and by algae and other growth on tidal rocks.

Low-water datum. A horizontal plane for referencing depths of water on hydrographic charts. "An approximation to the plane of mean low water that has been adopted as a standard reference plane for a limited area and is retained for an indefinite period regardless of the fact that it may differ slightly from a better determination of mean low water from a subsequent series of observations."¹⁵ The intersection of this plane with

¹³ League of Nations Doc. C.351(b).M.125(b).1930.V (Minutes of the Second Committee), pp. 202, 213.

¹⁴ See Francis P. Shepard, *Submarine Geology* (New York: Harpers, 1948), p. 68. But for legal purposes somewhat different technical definitions have been given in some instances. For example, in the *Borax* case (*Borax Consolidated, Ltd. et al. v. Los Angeles*) decided by the U. S. Supreme Court in 1935 (296 U. S. 10-27), the rule of the Court of Appeals was affirmed, which took as the high-water mark constituting the limit of the tideland the "mean high tide line," and directed that "an average for 18.6 years should be determined as near as possible by observation or calculation."

¹⁵ U. S. Coast and Geodetic Survey, *Tide and Current Glossary* (Spec. Publication No. 228, 1949 ed., p. 20). See p. 23 for definitions of "Mean low water," "Mean low water springs," and "Mean lower low water."

the land is what is usually meant, or should be meant, by "low tide line," "low water mark" and similar terms relating to the base line from which the territorial sea is measured.

Island is a term requiring definition when a body of "land" is submerged at high tide and awash at low tide. See the discussion below, page 253.

3. *Ocean Bottom Features*¹⁶

Continental Shelf. The zone around a continent, extending from the low-tide line to a depth at which there is a marked steepening of slope to greater depths. Conventionally, its outer edge is taken at 100 fathoms (alternatively 200 meters),¹⁷ but it may lie between 20 and 300 fathoms (it is believed to average about 72 fathoms or 132 meters).

Continental Slope. The declivity from the outer edge of the continental shelf into deeper water. (Its base is commonly between 2000 and 3000 fathoms.)

Island Shelf. The zone around an island or island group, extending from the low-tide line to a depth at which there is a marked steepening to greater depths.

Island Slope. The declivity from the outer edge of the island shelf into deeper water.

Continental Borderland. The zone between low-tide line and continental slope that, unlike the continental shelf, is broken into basins, islands, and banks. (When the zone between the lines of permanent immersion is broken into basins, islands and elevations, the term "Continental Borderland" is appropriate.)

4. *Phrases in Common Use*

A number of phrases frequently used in relation to the territorial sea should be critically examined as to their true intent and possible improvement.

"*Following the sinuosities of the coast*" is valid only in reference to the inner or landward limit of the territorial sea, and is appropriate in certain legal connotations. When used with regard to the seaward limit of the territorial sea the phrase is irrelevant because only the salient points on the coast usually count in actually determining the seaward limit. "Taking into consideration *all* points on the coast" would convey the intended meaning when applied to the seaward limit of the territorial sea. (See Fig. 1 below.)

¹⁶ This group of definitions is taken from the report of the U. S. representatives on the International Committee on Nomenclature of Ocean Bottom Features. It is therefore still subject to technical improvements by experts in the field.

¹⁷ 100 fathoms is exactly 600 ft. or 182.88 meters; 200 meters is exactly 109.36 fathoms.

"*Drawn parallel to the general trend of the coast*" is an ambiguous phrase that is too frequently employed. It should be avoided if possible. (See Fig. 1 and explanatory text, in this JOURNAL, Vol. 24 (July, 1930), p. 546.)

Many casually phrased terms, such as "on the perpendicular of the coast," "an imaginary line parallel to the coasts," and "the line following the geographic parallels" appear in laws, decrees, and sometimes in treaties. Any terminology that is intended to specify the limits of the territorial sea or of any contiguous zones should be submitted to an expert in surveying and mapping, in hydrography, or in navigation, for assistance in making the text convey the precise meaning that is intended, so that an engineer can lay the line down on the charts, or demarcate the line by range marks on the land or by buoys or other means in the water, if that should be feasible.

II. DELIMITATION PRINCIPLES AND TECHNIQUES

The principles and techniques which are formulated and explained below relate to emerging categories of water boundary delimitation that have not hitherto claimed serious attention of students. They are designed and believed to be of general applicability, and are independent of the width of the belts of waters claimed, whether 3, 4, 6, or 12 miles, "contiguous zones" (also called "adjacent zones"), the "continental shelf," or even 200 miles or something else. Delimitation principles and techniques¹⁸ will be considered in the order listed below:

1. Seaward limit of the territorial sea, and of any contiguous zone or zones;
2. Base lines for delimiting the territorial sea;
3. Outer limit of inland waters (a special "base line" problem);
4. Median line techniques—in gulfs, lakes, etc;
5. Lateral boundaries through the territorial sea, from land to high seas; and
6. Lateral jurisdictional lines of contiguous zones—as far out as desired, *e.g.*, to a median line in a gulf or lake, or to the edge of the "continental shelf."

¹⁸ An additional category was originally planned: Zones of access to the high seas, by surface and air, for states apparently denied access from relatively short coasts on bays or gulfs, because the usual delimitation techniques would pinch them off from the high seas. Problems would have been considered such as those of the Gulf of Aqaba, where both Israel and Jordan have very short coasts, between those of Egypt and Saudi Arabia, and where the differences of navigability by surface ships and maneuverability of airplanes within zones of access that might be delimited by special techniques are significant. But each case is almost unique; general principles could be stated, but perhaps no techniques of wide applicability could be evolved.

For economy of space and convenience in formulating delimitation techniques, the following abbreviations are used hereafter in the present article, whenever convenient:

- T = width of the territorial sea (3 nautical miles, 4, 6, 9, 12, etc.) claimed by any coastal state, measured from the low-tide line.
 C = width of the "contiguous zone" claimed (in nautical miles), always measured from the low tide line, and therefore *including the territorial sea*.

1. *Seaward Limit of the Territorial Sea¹⁹ and of any Contiguous Zones*

The first principle in delimitation of all seaward areas of national jurisdiction is that we should begin by laying down the *outer* limit of the

¹⁹ An article by the present writer, entitled "Delimitation of the Territorial Sea: the Method of Delimitation Proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law," appeared in this JOURNAL, Vol. 24 (July, 1930), pp. 541-555. The full text of the American amendment of March 27, 1930, and reproductions of the five illustrations appear in the L. of N. Acts of the Conf. for the Codification of Int'l. Law . . . Vol. III, Minutes . . . Doc. C.351(b).M.145(b).1930.V, pp. 197-201.

As a technical adviser to Mr. Hunter Miller, the United States delegate in the Second Committee (on Territorial Waters), the writer served as a member of the Technical Sub-Committee, and worked for nearly a month with the technical men from the thirty-eight other participating countries—not counting the Soviet Union, which sent only three observers. Out of the welter of divergent claims and suggestions came "the proposal of the delegation of the United States of America which was submitted at the Conference at the session of March 27, 1930, [which] represented an attempt to view all of the problems of delimitation [of the seaward and landward limits of the territorial sea] as a whole, and to set forth a body of rules both simple in application and definite in result" (Boggs, *loc. cit.*, p. 541). The proposal was very favorably received and was discussed at length in sessions of the full Second Committee. But, as not infrequently happens in international conferences, the technical specialists were much nearer agreement than the political delegates.

Vice Admiral Henry G. Surie, the very able Chairman of the Technical Sub-Committee, in acknowledging a reprint of the article referred to, concluded: "I am sure if at any moment the Codification Committee of the League of Nations will retake the problem of the Territorial Sea, your method of delimitation will be adopted as being, as you so justly said in the last line of your article, simple, impartial and clear."

These American amendment techniques have been used at least in the following official United States studies and reports:

(a) On a series of U. S. C. & G. S. charts of the United States especially prepared for use by the U. S. Tariff Commission in an investigation of fishing problems, under Senate Resolution 314, 71st Cong., 2d Sess., adopted July 2, 1930, 72 Cong. Rec. 12376; the report of the Commission states: "The line was drawn for the purposes of this investigation in accordance with the method of delimitation proposed by the delegation of the United States at The Hague Conference for the Codification of International Law at the session of March 27, 1930. The details of this plan are given in the American Journal of International Law for July, 1930." (S. Doc. 8, 72d Cong., 1st Sess., pp. 1-2.)

(b) The techniques were used, with minor adaptations, by the U. S. Bureau of the

territorial sea, and similarly of the contiguous or adjacent zone or zones if there be any. This is in accord with the comprehensive proposals for the delimitation of the territorial sea submitted by the United States Delegation at The Hague in 1930.

The American proposal was based on the assumption that, since we cannot choose our coasts but must take them as we find them, so the limit of the territorial sea, once the breadth of the belt is agreed upon, must be a line which is derived directly from the coast-line, in an automatic manner except where allowance must be made for existing agreements and situations.²⁰

The technique for delimiting the outer limit of the territorial sea is as simple as the use of litmus paper to determine whether a solution is acid or alkali. A portion of the northern coast of Norway is used as an example in Figure 1. The technique is independent of the breadth of the territorial sea, and the Norwegian 4-mile claim is here used. If 4-mile arcs are drawn from *all* points on a sinuous coast and from all offshore islands, the outer or seaward limit will be the *envelope* of all such arcs, and will be found to constitute arcs drawn only from salient points on mainland and islands.²¹

The general principle for delimiting the seaward limit of the territorial sea, in the language of the American amendment presented at the Hague Conference, reads as follows:

Except as otherwise provided in this Convention, the seaward limit of the territorial waters is the envelope of all arcs of circles having a radius of three nautical miles drawn from all points on the coast (at whatever line of sea level is adopted in the charts of the coastal State), or from the seaward limit of those interior waters which are contiguous with the territorial waters.²²

To illustrate delimitation of any contiguous zone²³ the 12-mile "en-

Census to determine the areas within the outer limits of the United States, and of the individual States, in coastal waters and the Great Lakes, for the 1940 Census (16th Census of the United States, 1940, Vol. 37, p. 2).

(c) The Department of Justice has urged adoption of these techniques in cases now pending before the U. S. Supreme Court.

²⁰ This JOURNAL, Vol. 24 (July, 1930), p. 541.

²¹ For a graphic indication of "the navigator's method of ascertaining whether he is in territorial waters or on the high sea" see this JOURNAL, Vol. 24 (1930), p. 546, Fig. 2; or see the same in Gilbert Charles Gidel, *Le Droit International Public de la Mer*, Tome III, *La Mer Territoriale et la Zone Contigüe*, Planche I, Fig. 5.

²² This JOURNAL, Vol. 24 (1930), p. 544.

²³ In the compilation of the map entitled "World: National Claims in Adjacent Seas," referred to above, footnote 4, and in the accompanying table, the United States is represented as claiming a contiguous zone 12 miles wide (*i.e.*, including the 3-mile territorial sea). This may surprise some people, but the provisions of the Tariff Act of 1790 relating to customs inspection, which have been repeated in all subsequent tariff acts, are strictly analogous to the criteria employed by the writer in determining whether other countries claim a contiguous zone.

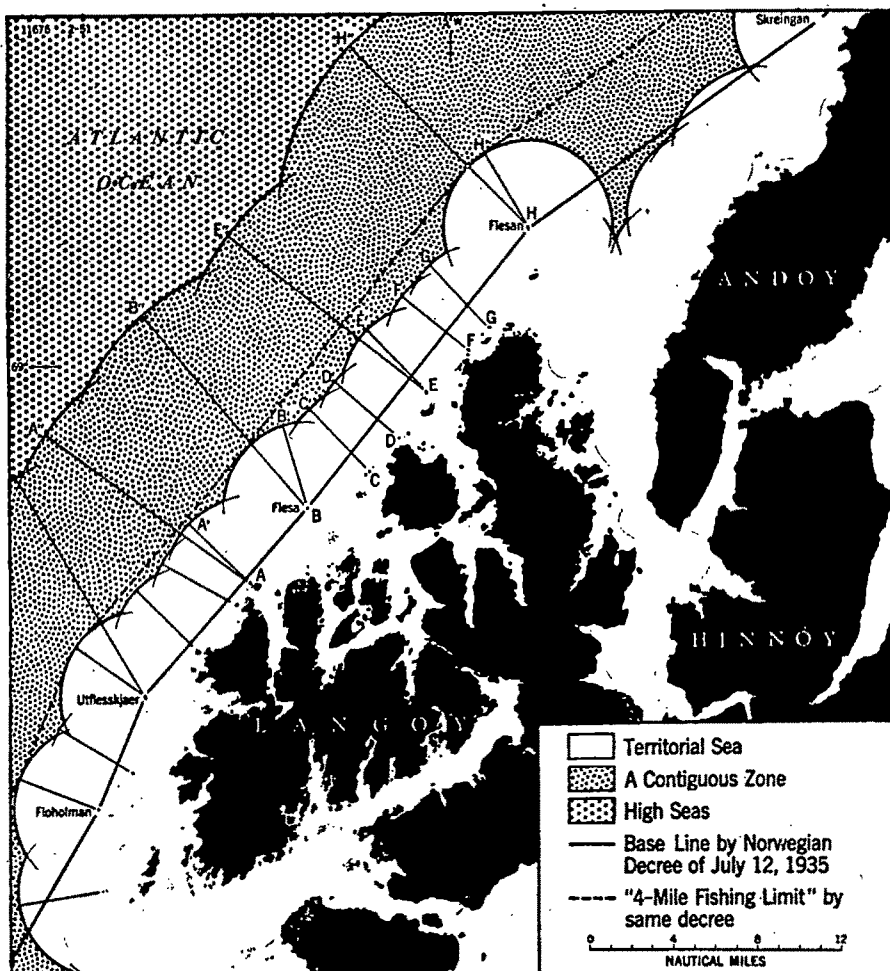


FIG. 1. SEAWARD LIMIT OF THE TERRITORIAL SEA AND OF ANY CONTIGUOUS ZONES

On a portion of the northwest coast of Norway the technique of laying down the outer limit of the territorial sea is here illustrated. The Norwegian claim of a 4-mile limit is here used. Areas of radius $T = 4$ nautical miles are described from all salient points on the coast (A, B, C, D, E , etc.), including outlying islands. The "envelope of the arcs of circles of 4-mile radius drawn from all points on the coast" constitutes the outer limit of the territorial sea, and is thus the line every point of which is exactly T -miles from the nearest point on the shore.

The minor "gain" in areas of exclusive jurisdiction frequently achieved by drawing a series of artificial straight lines as part of the "base line" is illustrated by the small area between the broken-line "4-mile fishing limit" (by Norwegian decree of July 12, 1935) and the envelope of 4-mile arcs.

The technique of laying down the limit of any contiguous zone is seen to be the same as for the territorial sea. For purposes of illustration a contiguous zone 12 miles wide is here assumed, constituting the arcs A'', B'', E'', H'' , etc. The wider the contiguous zone the fewer will be the number of salient points that actually determine its "envelope"; but all of these salient points will also be among those that determine the outer limit of the territorial sea.

velope" (as claimed, for example, by the Soviet Union on its own coasts, though apparently not admitted on the coasts of other countries) is also shown on Figure 1. Theoretically 12-mile arcs would be described from all points of the coast, including outlying islands. Actually the "envelope" will be seen to constitute 12-mile arcs drawn only from some, but not all, of the salient points which were found to have been used in delimiting the 4-mile "envelope." The same would be true with the 3-mile envelope, or with a 6-mile zone. Of course, the wider the belt the smaller the number of salient points that determine its "envelope of arcs."

If the international community were to reach agreement on the recognition of one or more contiguous zones, for specific and limited purposes, the technique proposed above will afford precise delimitation.²⁴

With reference to the assimilation of objectionable "pockets of high sea" as proposed by the American Delegation at the Hague Conference, 1930, see this JOURNAL, Vol. 24 (1930), pp. 552-553 and Fig. 6 on p. 547. In the writer's viewpoint, the elimination of unworkable pockets of the high sea is an essential principle in the delimitation of the territorial sea.

2. *Base Lines for Delimiting the Territorial Sea, etc.*

Much of the difficulty in agreeing upon principles and techniques of delimitation of the territorial sea derives from the eagerness of some people to begin by drawing a series of artificial "base lines," as if nature were niggardly in providing what men require in this regard. Many officials, in their patriotic efforts to fence off maximum areas of waters which they hope will go unchallenged, begin by drawing artificial base lines along concave coasts, between islands, and across bays, gulfs and estuaries. This

²⁴ A development relating to "contiguous zones" that may be reasonable is suggested below. The high seas are generally acknowledged to be *res communis*. The sea bed and its subsoil somewhat beyond the 3-mile limit, or at least their exploitable natural resources, have been assumed by several nations in recent years to be *res nullius* over which they therefore have the right to make unilateral assertions of jurisdiction, and in some cases full sovereignty. There may be two very great resources, hitherto practically untapped, beyond the seaward limit of the territorial sea: (a) petroleum and possibly other minerals; and (b) marine life in the productive levels of the sea perhaps 200 to 1,000 feet beneath the surface. Little is known of the latter at present, but marine biologists and oceanographers are attempting systematic studies of the possible utilization of these elusive resources. The seas cover nearly three-fourths of the earth's surface, and the importance of subsurface marine life as a source of proteins and vitamins and other needed materials may be great by the time a knowledge of the population structure of individual marine species is acquired, and when gear is devised to harvest the crop. The significance here is that the net revenues that will in time be available from the exploitation of minerals and marine life in the vast sea areas that come to be regarded as *res communis*, may eventually be very considerable, and it might be agreed upon as an independent source of income for the international agencies, especially the United Nations and the specialized agencies. Because such exploitation depends almost entirely upon the development of new techniques, it would not deprive any nation of a present source of income.

office-desk approach, in geographical situations as varied as the good earth affords, yields results that defy codification or the formulation of workable principles of general applicability. Broad zones of water may appear enchanting on the maps, but their authors are eligible for disillusionment if they were to examine some of them in a launch.

But if concern with "base lines" be initially confined to the definition of the mean low-tide coastline, and the delimitation of the territorial sea otherwise *begin with the outer limit* of the territorial sea as suggested above, it is surprising how much more workable are the results and how many obstacles are surmounted or found to be non-existent.

As illustrated in Figure 1, the "envelope of arcs" of T-mile radius constituting an unbroken or *continuous series of arcs* may actually be described from a series of salient points, including islands, and *does not require a continuous "base line."*

Precise identification is needed of the base lines from which delimitation is made of: (a) the marginal or territorial sea; (b) median lines in lakes and gulfs; and (c) lateral jurisdictional lines, from the termini of land boundaries out as far as may be desired—to the high seas, to a median line, or even across the continental shelf. It might be supposed that the base lines would be identical in all these cases, but it will be found that they should differ in *the inclusion or the exclusion of islands* (for reasons that will be explained later), as follows:

(a) In delimiting the seaward limit of the territorial sea all *bona fide* islands must be taken into consideration;

(b) In laying down a median line in a gulf or lake, and also in laying down a lateral boundary from the coast out to the high sea, practically all islands should be, at least initially, disregarded and therefore do not constitute part of the base line.

Base line problems are chiefly of three types:

(a) The shoreline, essentially the tidal datum or plane on which the hydrographic charts are based;

(b) The line between inland waters and the territorial sea—in bays, gulfs, etc., where it serves as an artificial coastline in delimiting the territorial sea and, conceivably in part, median lines and lateral jurisdictional lines (considered separately under later headings); and

(c) The definition of "island"—to determine which islands are to be used, and which are to be ignored, in delimiting the territorial sea, etc.

The three types, (a) the shoreline, (b) artificial coastlines, and (c) the definition of "island," are here considered:

(a) *Shoreline base lines.* The generally accepted intent is that the territorial sea shall be delimited outwardly from the mean low-water coastline

(whether the belt be 3, 4, 6 or more miles wide). The base line²⁵ differs, however, on charts of different countries, and in fact sometimes on charts of different scales published at different times by a single country. If precise delimitation is necessary (requiring large scale charts), *e.g.*, in shallow waters near the mouth of a large river such as the Yangtze or the Ganges, charts must be found on which the proper base line is represented.

Most hydrographic charts are on scales too small to permit representing both the high-tide and the low-tide coastlines. On practically all but the largest scale charts the shoreline represented is the *mean high-tide line*: but the *soundings* indicated in the sea areas are based on the *low-tide datum*. In other words, the practice believed best adapted to the requirements of the navigator (for safety of life and property at sea) is to represent as the land area that which always appears as land, even at high tide; but also to indicate the minimum water depth as experienced at mean low tide. The "low water datum" used by chart-producing countries varies considerably, "but is usually lower than mean low water." When the scale of the chart permits, and the range of tide is sufficiently great to justify or require it, the maximum height of water (*i.e.*, at mean high tide) covering the narrow belt of land subject to the tide is shown in numerals that are differentiated from those in the seaward areas by underscore or by special type.²⁶

²⁵ The base line proposed in the Report of Sub-Committee No. II [the "Technical Sub-Committee"] at the Hague Conference, 1930, was defined as follows:

"Subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the line of low-water mark along the entire coast.

"For the purposes of this Convention, the line of low-water mark is that indicated on the charts officially used by the Coastal State, provided the latter line does not appreciably depart from the line of mean low-water spring tides."

²⁶ A good example of a chart on which both the high-tide coastline and the low-tide line are indicated, and the zone normally covered and uncovered each tidal day (once or twice, depending on the type of tide in the area), is U. S. Hydrographic Office chart No. 3218, approaches to the Yangtze River, scale c. 1:121,000, on which soundings are shown in feet "reduced to the approximate level of Lowest Low Water." As this is a region of relatively large differences between high and low tides, and also one of silt deposition from the Yangtze River, a coastal zone ranging up to about 5 nautical miles wide appears on the chart, showing in a special color the land between low and high tides, and tidal differences up to 18 ft. Similarly these areas that uncover at low tide are shown adjacent to islands; and isolated mudflats that entirely cover at high tide appear as "islands" in this special color. This is the ideal type of chart from which to delimit the territorial sea—where precise delimitation is desired—because the low-tide line is clearly indicated.

But in almost all parts of the world the strip of land that covers and uncovers with the tide is so narrow that it is scarcely mappable at the scales of ordinary hydrographic charts, frequently not being much wider than the width of a line on the printed chart. *The low-water base line from which the territorial sea is delimited is therefore usually not shown on published charts.*

A series of tide tables, giving predictions for a year, is published annually by the U. S. Dept. of Commerce Coast and Geodetic Survey, which covers the world in 4 volumes. Typical tide curves are shown in the introductory pages, and provide graphic

(b) *Artificial coastlines.* Except for the 10-mile rule for bays and estuaries,²⁷ the use of artificial base lines (usually arbitrary straight lines), should be very limited. It is suggested that, except where they are regarded as having been established by prescription, they be understood to be effective only when interested states, or the international community, specifically accepts the claims of the coastal state. It is true that man requires definiteness and that nature usually discloses gradualness of transition. But the outer limits of the territorial sea and of any contiguous zones are fully as specific and continuous, when delimited only from all points on the low-tide coastline, including islands, as explained in the preceding section, as they can be if based, in part, on straight arbitrary base lines.

(c) *Definition of "island"* (in relation to base line problems). All ordinary islands (*i.e.*, not wholly submerged at high tide) have the normal belt of territorial sea. Question arises whether a low-lying "island" (mudflat, rock, etc.), which is covered at high tide and dries only at low tide, shall be regarded as an island entitled to its own belt of territorial sea.

Without going into the complicated question further and citing numerous references, the writer favors the rule adopted by Sub-Committee No. II (the "Technical Sub-Committee") at the Hague Codification Conference, 1930, namely:

Elevations of the sea bed *situated within the territorial sea* [italics supplied], though only above water at low tide, are taken into consideration for the determination of the base line of the territorial sea.²⁸

Any elevation of the sea bed that dries at low water, in case it lies within the 10-mile limit of mainland or of other *bona fide* islands (never covered by the tide) is thus regarded as an "island" and is accorded a belt of territorial sea measured from its own low-tide line. But if such a problematical island lies *outside the territorial sea* delimited from the mainland or from a never-covered island, it shall be *disregarded* in delimiting the territorial sea and shall have no belt of its own.

Geological history of a coastal region is sometimes adduced as if the shorelines of tens of thousands, even millions of years ago, might be taken into account in modifying the present low-water datum in water area delimitation. Certainly geological history, where fully deciphered, explains present shorelines, the presence and availability of minerals, and the distribution of banks and shoals, some of which are good fishing areas. Recalling that there are established rules relating to gradual or sudden changes of river courses (accretion or avulsion) in boundary matters, the

illustration of the very great differences in the characteristics of tides in different parts of the world.

²⁷ See this JOURNAL, Vol. 24 (July, 1930), pp. 550-551, and Fig. 5 (p. 547).

²⁸ Report of the Second Commission (Territorial Sea) [L. of N. Doc. C.230.M.117. 1930.V.], p. 11.

supposed option of citing the geological past, when it appears to serve one's purpose, in order to advance seawardly the base line in delimiting the territorial sea, seems to constitute an extraordinary type of special pleading.

3. *Outer Limits of Inland Waters*

The principles and techniques relating to "Bays and estuaries," involving both definition and delimitation, which were proposed by the United States Delegation at The Hague, 1930, as they were explained by the writer in this JOURNAL (Vol. 24 (July, 1930), pp. 548-552, and Figs. 3, 4 and 5), do not seem to require revision. The fact may be emphasized that, if the T-mile "envelope of arcs" were initially described on the charts, and if there were any islands in front of a gulf or bay (as in Fig. 3(b) referred to above), no delimitation of the outer limit of inland waters would be required in order to determine the seaward limit of the territorial sea.

Where there are numerous islands, as along parts of the coasts of Maine, or Norway (Fig. 1, above, page 249), the territorial sea may be much more than T-miles in width between the seaward limit and the mainland. Usually the regime of the territorial sea, for example, innocent passage, is assumed to apply to the entire belt of water, regardless of width.

There are some stretches of coast, however, where the screen of numerous islands or the exceptional sinuosities of the mainland shoreline would seem to justify, if not to require, regarding part of the waters nearest the mainland as "inland waters" even though there is no approximation to a "bay" as hitherto considered in the delimitation of the territorial sea. And because jurisdictional limits should be precise, and techniques may be needed in cases involving international law, a hypothetical situation is discussed here.

The problems presented on Figure 2 constitute a geographical composite of problems encountered in several specific areas, which can be most succinctly discussed in connection with this hypothetical example. The numerous small indentations of island and mainland coastlines illustrated are of such configuration that, if they were ten times as large, they would constitute "bays" and would present a very different type of problem. In view of the very unusual nature of the geographical-geometrical problem presented, a slight extension of the method of delimitation recommended in 1930 as of universal applicability seems to the writer to be called for.

For the exceptional type of geographical situation here encountered the following principles seem to be applicable:

1. The outer limit of the territorial sea should be exactly the same as if all the recessed waters were part of the territorial sea instead of partly inland waters. That is, the seaward limit should constitute the envelope of arcs of all circles of 3-mile radius drawn from all points on the coast, including islands, and from only those straight line "arti-

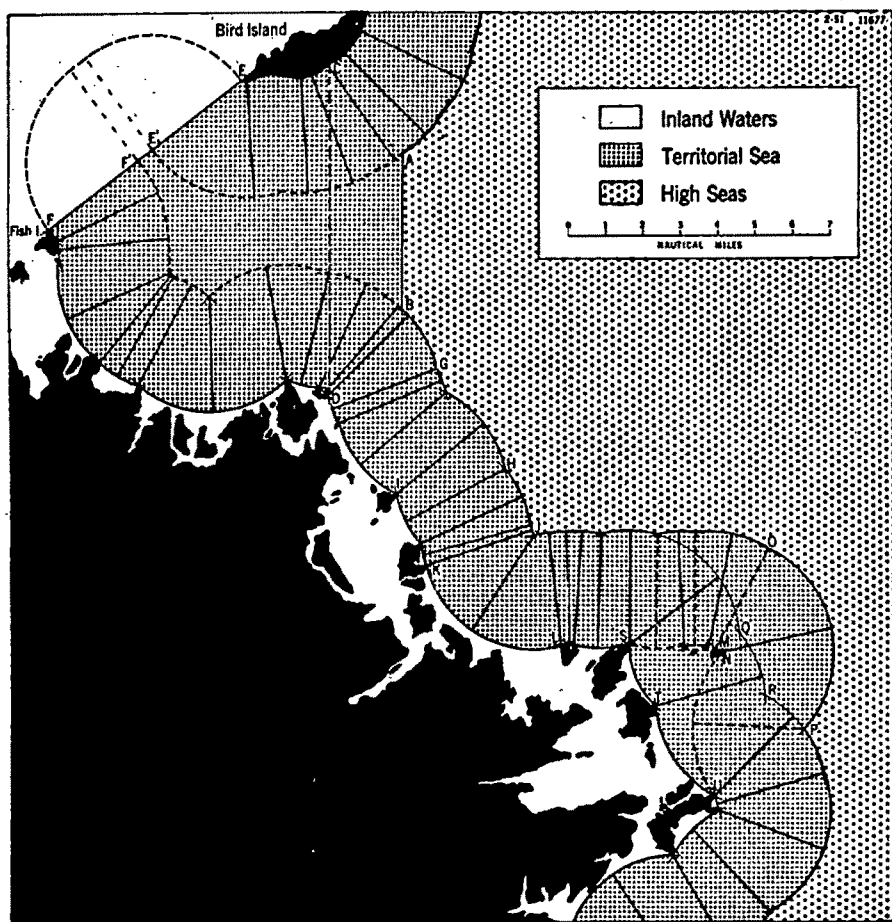


FIG. 2. OUTER LIMIT OF INLAND WATERS
(A Possible Solution of a Special Base Line Problem)

The first step in delimitation is to lay down the seaward limit of the territorial sea, comprising the envelope of 3-mile arcs passing through such points as B, G, H, J, O and P. Then in order to supplement the intricate shoreline pattern of mainland and islands by a simpler outer limit of inland waters, and at the same time allow a belt of territorial sea which is *everywhere a minimum of 3 miles*, it is necessary to describe a series of reverse 3-mile arcs concave toward the land, centered at the points of intersection of the arcs in the "envelope" limiting the territorial sea, from points G, H, J, etc. These arcs will never traverse land, but they will always be tangent to mainland or adjacent islets.

A problem will be seen to arise where outlying islets near M and N determine the territorial sea limit at O, P, etc. An anomalous large area of "inland waters" would result if the reverse arcs were swung from O and P. For inland waters, therefore, seaward arcs from S, T, U, etc., on the larger islands and immediately adjacent islets are described, through Q, R, etc. Then reverse arcs tangent to S, T, etc., would constitute part of the outer limit of the inland waters.



ficial coasts" that are justified by the definition of "bays and estuaries" proposed in 1930.²⁹

2. The territorial sea should everywhere have a minimum width of 3 miles.

3. Where islands lie between inland waters and the territorial sea (e.g., "Fish I.," on Fig. 2), the outer limit of inland waters is the low-water shoreline on the landward side.

As illustrated in Figure 2 and explained beneath, the envelope of 3-mile arcs is first laid down on the chart, constituting the seaward limit of the territorial sea. The unique feature in this problem is that the only way to provide the minimum width of 3 miles for the territorial sea in some areas is to describe *reverse 3-mile arcs, centered at the points of intersection of the arcs comprising the seaward limit of the territorial sea*. Actually it provides a simplified artificial coastline that may, in some instances, be more satisfactory than an exceptionally irregular coastline.

Another type of problem is illustrated between points *E* and *F*, on "Bird Island" and "Fish Island," which are shown here as more than 6 miles apart. In order to provide a full 3-mile belt of territorial sea, the inland waters' outer limit would usually have had to lie at least 3 miles inland, and would therefore constitute 3-mile arcs from *E'* and *F'*, joined by a straight line equal to *E'F'* and parallel to it, as represented by broken lines in Figure 2. But the fact that the relationship of Fish and Bird Islands to the main group of islands to the south produces an objectionable "pocket of high sea," west of the line *AB*, calls for the assimilation of that pocket by the territorial sea, so that the line *EF* would here properly serve as part of the outer limit of inland waters.

4. Median Lines—Techniques of Delimitation in Gulfs, Lakes, etc.

In inland waters, where an international boundary traverses a river or a lake, the boundary may be defined as following either the *thalweg* (a vertical cross-section concept, properly applicable only if there be a navigable channel) or the *median line* (a horizontal-plane concept).

In gulfs, lakes and seas, the median line may constitute either: (a) a portion of an ordinary boundary (as in Lake Erie); (b) the *seaward terminus* of a lateral jurisdictional boundary agreed to by contiguous states, extending from the land boundary out to the median line in a gulf, lake or sea; or (c) the *lateral jurisdictional boundary* between adjacent states, for specific purposes, e.g., from the coastal terminus of a land boundary out to, or toward, the edge of the "continental shelf."

The only practicable and unambiguous definition of the "median line" (applicable in all cases) is "the line every point of which is equidistant

²⁹ Especially the rule for small "bays" using a graphic method, with one-fourth of the distance between salient points ("headlands") as the radius of arcs for "envelopes" and comparing the area with that of the semi-circle of the same radius (Fig. 5, this JOURNAL, Vol. 24 (1930), p. 547).

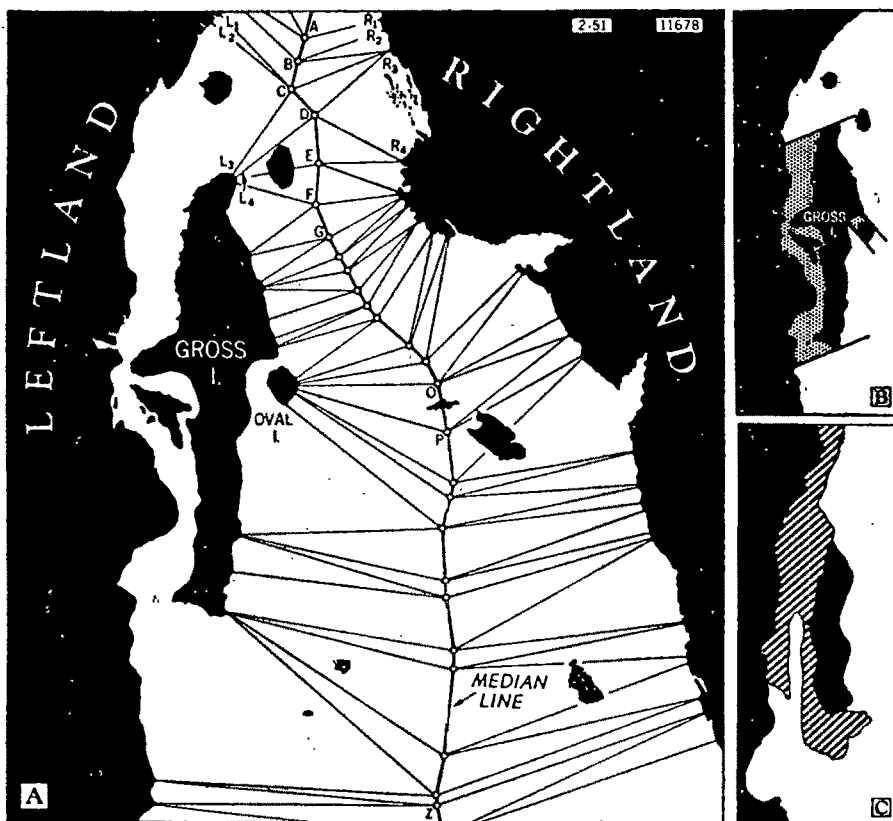


FIG. 3. MEDIAN LINE TECHNIQUES

This illustration is devised especially to present the problems and techniques of laying down a median line in lakes, gulfs, etc., and in particular how to deal with islands. The opposing coasts in this illustration are taken from different parts of the world, and are slightly modified for the present purpose.

(A) *The Median Line*, the construction of which is here shown, is the line every point of which is equidistant from the nearest point or points on opposite shores. Each of the *turning points* (found by trial and error with a pair of dividers), such as A, B, C, and D, is equidistant from *two or more points on the same shore* as well as from one or more points on the opposite shore, e.g., D from L₁, R₃ and E₁.

(B) The means recommended for determining whether an island is to be regarded as if it were part of the mainland and thus used as part of the base line in laying down the median line—or, on the other hand, whether it is to be disregarded—is here illustrated. First draw that *pair of parallel lines* tangent to opposite ends or sides of the island which *encloses the least area of water* between island and mainland, as here shown for "Gross I." (shaded in illustration). If the land area exceeds the water area behind it, the island is used as part of the base line (as here); otherwise it is ignored.

(C) This diagram illustrates an island separated from mainland by a relatively large area of very shallow water—the *low-water shoreline* not ordinarily being shown on hydrographic charts. The low-water shoreline must be ascertained, and *here the area exposed at low tide is shaded*. Unless the "island" proves to be part of a peninsula at low tide (as here), the method recommended under (B) would be applied.

from the nearest point or points on opposite shores"—of the river, lake, gulf or strait.³⁰ The construction of such a line is shown in Figure 3. An infinite number of points may be found, using a pair of dividers, each of which is equidistant from the nearest points on the left and right banks or shores, as indicated by the points L_1 , L_2 , R_2 , etc. The median line constitutes a series of straight lines, each turning point being equidistant from two or more points on the same shore, as well as from one or more points on the opposite shore.

Islands in a lake, gulf or bay may complicate the determination of the base line employed in laying down the median line. Because islands, large and small, are found both near and far out from coasts, in water bodies of all sizes and shapes, it seems uncontroversial that the median line should, as a general rule, be derived as nearly as proves feasible only from the mainland coast. Obviously, some islands must be treated as if they were part of the mainland. The size of the island, however, cannot in itself serve as a criterion, as it must be considered in relation to its shape, orientation and distance from the mainland. The most reasonable and workable rule is believed to be to draw *that pair of parallel lines* tangent to opposite ends or sides of the island which encloses the *least area of water* between island and mainland, as illustrated for "Gross Island" in Figure 3(B). Then, if the land area of the island (properly planimetered from the low-tide shoreline) exceeds the water area bounded by the parallel lines, the island and mainland, the island should be reckoned as if part of the mainland base line, in laying down the median line—as is true in the case illustrated. The same technique may be employed with reference to a second island adjacent to an island thus found to be regarded as if mainland—as is also illustrated in Figure 3(B); but its parallel lines must be drawn independently.

When a median line passes very near islands in the middle of a lake or gulf (or even traverses some islands), if any island be found to be "on the wrong side of the median line boundary" (that is, if an island of clearly established sovereignty is in the waters of another state), the alternatives appear to be: (1) Agree to shift the jurisdictional line from the exact

³⁰ When Col. Lawrence Martin was engaged in the study of the Michigan-Wisconsin boundary question he requested the writer to make a strict delimitation of the median line in Lake Michigan. The technique then developed was made use of, the writer is informed, by the Supreme Court in preparing its decree of March 16, 1936 (297 U. S. 547-52), which corrected the boundary description in the Green Bay section as given in its decree of Nov. 22, 1926 (272 U.S. 398). That study led to the writer's article "Problems of Water Boundary Definition" in the *Geographical Review*, Vol. 27 (1937), pp. 445-456, which is reproduced (with minor revisions), with permission, in the author's *International Boundaries*, as Chapter X, "Water Boundaries." See pp. 178-185 in the latter for the elimination of unworkable concepts, with illustrations of certain impracticable verbal and "landsman's viewpoint" concepts, and maps showing strict median lines in Lakes Erie and Michigan.

median line, to accommodate the island in question; or (2) Agree that the state which has sovereignty over the island shall exercise jurisdiction over it (presumably including its normal belt of territorial sea) without regard to the median line.

The case of an island separated from the mainland by a relatively large area of water which is known to be very shallow (as represented by the high-water shoreline employed as the chart datum) is illustrated in Figure 3(C). In such instances it will be necessary to determine independently how much of the intervening water area is actually uncovered at mean low tide, and thus to discover whether the "island" is really a peninsula for base-line purposes, or whether the water area intercepted between the *low-tide base lines* of both island and mainland and parallel lines constructed as in Figure 3(B) is less or greater than the area of the island area within its low-tide line.

5. *Lateral Boundaries through the Territorial Sea, from Land to High Sea*

The boundary between two coastal states should terminate, not on the shore but at the point where their respective territorial waters meet the high seas. Principles and techniques which are adequate for all such situations, we believe, are provided in the writer's article "Problems of Water Boundary Definition" in *International Boundaries* (cited above, footnote 30).

Where there are no islands or exceptionally irregular coastline, the most reasonable boundary is a single straight line from the low-tide terminus of the land boundary to the point of intersection of the envelopes of T-mile arcs drawn from all points on the shores of the two countries—in each instance swinging the arcs shoreward from the land boundary terminus, as if the contiguous state were a water area. Such a line will usually be more than T-miles long, unless the land boundary terminates at a salient point.³¹

Where there are several islands, the most reasonable boundary is a line beginning at the land terminus, usually drawn first to the points of intersection of envelopes of T-mile arcs (as defined above), and continued by median-line techniques between the islands of different sovereignty, and ending at the high seas at the point of intersection of T-mile arcs from the outermost islands.³²

³¹ See the writer's *International Boundaries*, p. 188, Fig. 25, with its explanatory text.

³² See *ibid.*, p. 190, Fig. 26 and its explanatory text. That illustration is based on the problem presented between Panama and the Canal Zone at the Pacific end. The *salient points* on the mainland and on the islands are identical with those on an accurate map of the Canal Zone and Panama, although the coasts and islands were modified elsewhere, and the illustration was rotated to provide a more convenient position for the legend. But the geometrical line *A-B-C-(etc.)-K* is identical with the writer's conception of a proper boundary in these waters, because of the identity of the salient points.

The boundary problem in this area was studied because of the claim arising from the

An international water boundary defined in accordance with the principles set forth above is found in the Treaty of Peace with Italy, signed at Paris, Feb. 10, 1947, Art. 22, par. (iv):

(iv) Thence the line follows the main improved channel of the Quieto to its mouth, passing through Porto del Quieto to the high seas by following a line placed equidistant from the coastlines of the Free Territory of Trieste and Yugoslavia.

6. *Lateral Jurisdictional Limits of Contiguous Zones*

If it be recognized that developing technologies may bring into grasp in the relatively near future some of the great resources of the sea and of the sea bed and its subsoil at very considerable distances from shore in at least a few areas, and that states or private initiative will require assurance in advance that their interests will be generally admitted, some principle should be formulated for the delimitation of the contiguous zones between adjacent states. The principle here enunciated will, the writer hopes, prove to be of universal applicability.

Where a state is actually prepared to explore or to utilize the resources of the sea bed and its subsoil beyond the territorial sea (perhaps out to the "edge" of the "continental shelf,"³³ or to a median line in a gulf or lake), the techniques described below may be deemed so reasonable that they will be accepted by neighboring states; or even employed by one state in its

collision of the S.S. *David* (Panamanian) and the S.S. *Yorba Linda* (U.S.A.), May 11, 1923. The decision of the U.S.-Panama General Claims Commission stated: "... While the treaties undoubtedly fix the boundary between Panamanian territorial waters and the territorial waters of the Canal Zone, it is clear that they do not purport to fix the seaward limit of the territorial waters of the Canal Zone. *That is left to the rules of international law*" (italics added). See U. S. Dept. of State, Arbitration Series No. 6 (1934), pp. 765-820; also this JOURNAL, Vol. 28 (1934), p. 596; and Hudson, *Cases on International Law* (2nd ed.), p. 624.

³³ The desire to establish claims to jurisdiction, even to sovereignty in some instances, may be ascribed in part to chauvinistic cartography, because it sometimes seems gratifying, especially to some government officials, to point to expansive zones on the map as if they were universally accepted as national territory. It should be remembered that the supposed value of the "continental shelf" lies largely in the possibility of extracting vast quantities of petroleum from the submarine subsoil—witness "Lake Maracaibo" and its great production. Two facts should be kept in mind: (1) that petroleum is found beneath only a small percentage of the land surface of the earth, and that geologically its occurrence in the "continental shelf," however extensive, presumably is limited to a small portion of the total "shelf"; and (2) that in stormy seas it may be feasible to extract petroleum only in relatively shallow waters for many years to come. The feasibility of conducting petroleum operations in oceanic waters more than, say, 150 feet or 50 meters deep may be quite remote. Discretion suggests the unwisdom of becoming greatly concerned regarding precise delimitation of seaward areas of national jurisdiction in waters 600 feet or 200 meters deep, near the outer edge of the "continental shelf."

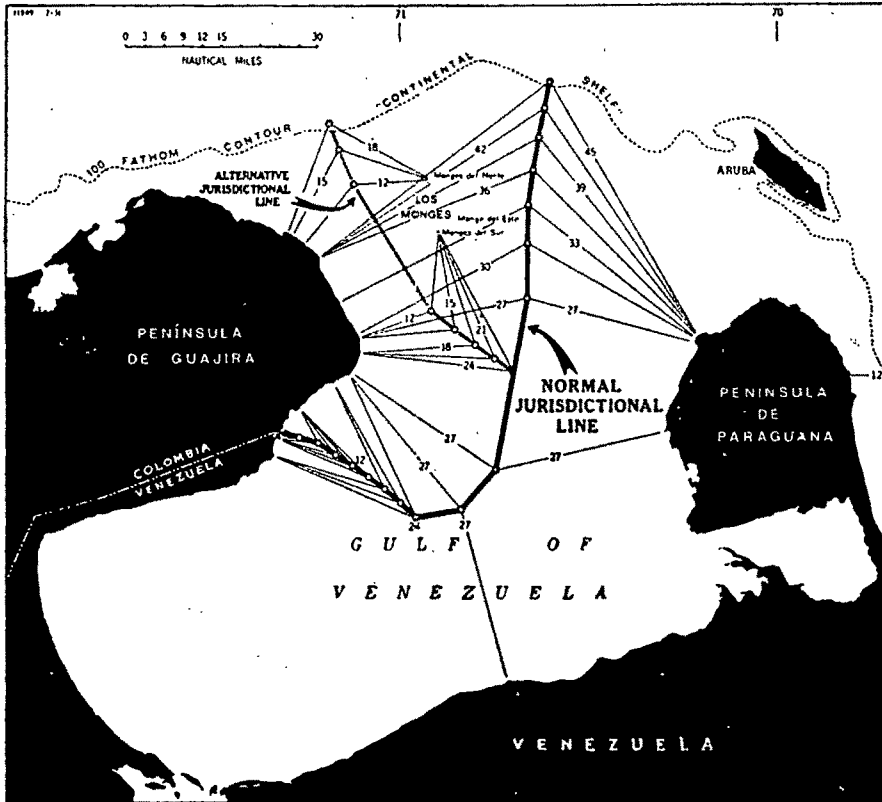


FIG. 4. LATERAL JURISDICTIONAL LIMITS OF CONTIGUOUS ZONES

The Colombia-Venezuela situation in the Gulf of Venezuela illustrates typical problems in defining a water boundary from land out to the presumed "edge" of the "continental shelf." Beginning at the coastal terminus of the demarcated land boundary ($11^{\circ} 51' 07''.41$ N., $71^{\circ} 19' 19''.80$ W.), the "normal" jurisdictional "boundary" is developed by describing envelopes of arcs of circles at successive intervals of 3, 6, 9, etc., nautical miles, until it crosses the presumed edge of the continental shelf—a little short of the 45-mile envelope intersection in this instance. This "normal" jurisdictional line ignores islands—the Monks Islands (Los Monges) belonging to Venezuela, and Aruba (belonging to The Netherlands).

An alternative line is shown (.....) assuming that the two countries were to agree to take the Monks Islands into account. In this instance, the developed line, after reaching a point 27 miles from the mainland of the two states, connects intersections of arcs of 24-, 21-, 18-, 15- and 12-mile radius as it approaches the islands; then, because the 9-mile arcs do not intersect, a long straight line connects two intersections of 12-mile arcs before again widening to 15- and 18-mile arcs, which presumably carry the line to (and beyond) the edge of the "continental shelf."

assertion of jurisdiction, subject to subsequent mutual agreement or to appeal to established legal authority.³⁴

The basic principle proposed is that the lateral jurisdictional limit should be *developed progressively from the outer limit of sovereignty*, which is the seaward limit of the territorial sea. In this progressive development or extension of the line of lateral jurisdiction, greater and greater stretches of the coasts of the two adjacent states are taken into consideration, thus taking into account all of the sinuosities of the coast, including gulfs and peninsulas, large and small. That part of the line from the low-tide coastal terminus of the land boundary, through the territorial sea, has already been covered, and therefore we begin at the outer limit of territorial waters in the normal sense.

The most reasonable and just line would be one laid down on the "median line" principle—a line every point of which is equidistant from the nearest points on the seaward limits of the territorial sea of the two states concerned. In actually laying the lines down on the chart, because all lines measured outwardly from the envelopes of arcs of 3-mile radius of the territorial sea must likewise be constructed as arcs of circles of greater radius and be concentric with the arcs of the 3-mile "envelope" of the territorial sea, the median-line-principle line may best be constructed from points on the actual coastline itself.

But because relatively few coasts are mapped so accurately as to make a line "every point of which is equidistant from the nearest point" on the outer limit of the two territorial seas much more than a close approximation to the true "median line" (if the coasts were accurately mapped), it is suggested that the lateral line be laid down, first, by describing the envelope of the arcs of circles of 6-mile radius from the coasts of the two states, noting carefully the point in which they intersect, and connecting that with the point of intersection of the 3-mile arcs. Then proceed successively to describe the envelopes of arcs of 9-mile, 12-mile, 15-mile radius, etc., until the line is carried out as far as desired. The lateral jurisdictional line thus developed is very sensitive to the vagaries of the coastlines of both states. In the example selected for Figure 4, which is the Gulf of Venezuela³⁵ just north of Lake Maracaibo, it will be noted that, at about 27 miles from shore, a point on the south coast, and then a point on the east coast (Penin-

³⁴ The method here suggested would provide the "equitable principles" for accord between the United States and a neighbor state which are referred to in Presidential Proclamation No. 2667, signed Sept. 28, 1945 (Fed. Reg., Vol. 10, Oct. 2, 1945 p. 12303; also this JOURNAL, Supp., Vol. 40 (1946), p. 45). Various decrees and laws of other states since that date similarly call for accord on the basis of equitable principles.

³⁵ An attaché of one of the embassies in Washington asked the writer several years ago to show him how to lay down a "boundary" between Colombia and Venezuela in these waters. No literature on such techniques was found, and several hypotheses were formulated and tried successively. Perhaps no more interesting problem of this sort could have been posed, for the example has about all possible variations.

sula de Paraguana) become the nearest points of Venezuela, whereas the nearest points of Colombia at the same distances necessarily remain on the Guajira peninsula.³⁶

CONCLUSIONS

1. Precise delimitation of all seaward areas of national jurisdiction is essential if the resources of the sea bed and subsoil, and of the waters themselves, are to be utilized constructively for the benefit of mankind. Presumption of the right of the state to develop those resources, perhaps at considerable distances from shore, should therefore be recognized by the international community under conditions that assure: (a) the progressive development of the interests of the international community; (b) the maintenance of peace under law; (c) orderly, conservational use of the resources provided by nature; and (d) unhampered, peaceful navigation of the maximum area of waters and overlying airspace. It might also afford revenues accruing to the international community.

2. No single belt of adjacent seas, whether 3 or 3,000 miles wide, could actually and effectively serve all the purposes of each national state—for security, fishing, surface and air commerce, mineral exploitation, and other interests—and also be acceptable to other states. No such “crustacean psychosis in an avian age”³⁷ can cope with the problems emerging from the vast expanses of water that cover more than two-thirds of the earth’s surface. The “one ocean” and its many arms in gulfs, bays, and seas, with their overlying airspace and the underlying sea bed and subsoil, constitute the area of greatest common interest to all mankind.

³⁶ If greater refinement in the lateral jurisdictional line were desired, it could be developed at increments of one mile from the outer limit of territorial waters. In a region known to be highly mineralized and in which mining operations are believed to be practicable it would seem desirable to map the coasts accurately, and then to lay down the lateral boundary of the most sensitive and accurate type—on the “median line” principle, every point being equidistant from the nearest points on the shores of the two states concerned. But otherwise the adoption of 3-mile increments would seem most feasible and altogether fair and adequate. Every 3-mile-increment *turning point* is actually a point on the line drawn on the strict “median line” principle; and it is appreciably easier to lay down on the chart than the true “median line.”

In laying down one of these lateral jurisdictional lines on a chart it is important to use a *beam compass*, so that both the pivot-point and the pencil-point are always perpendicular to the chart on which the line is being developed. An ordinary compass, with spreading points, becomes very inaccurate as the distances from the coast increase. And if ordinary charts are used in high latitudes (especially Mercator charts) it is essential to take into consideration the changing scale as the distance from the equator increases: one minute of latitude equals one nautical mile at the particular latitude.

³⁷ A phrase employed in an article on “Mapping Some Effects of Science on Human Relations” (Scientific Monthly, Vol. 61 (1945), pp. 45–50, a subject in which the writer has had a special interest for several years.

3. It should be realized that some of the unilateral assertions of jurisdiction or even full and exclusive sovereignty over wide areas of adjacent seas and sea bed are explicable only in the search for national security or revenue, in a desire for national aggrandizement, or in a sort of "carto-hypnosis" (hypnotism by cartography), and that most of them cannot be acknowledged by the international community—the interests and rights of which should predominate.

4. Delimitation of the territorial sea and of any contiguous zones is generally feasible only in geometrical terms based on the present geographical characteristics of the shorelines. However much may be learned about the present submarine topography and about the geological past (which will far exceed the expectations of most people), "boundary" descriptions could not be expressed in submarine topographic terms analogous to the geographic terms employed in land boundary descriptions, nor should they have to await the results of accurate hydrographic surveys based on the most modern techniques.

5. New delimitation problems arise only with respect to "contiguous zones"—both the seaward limits that may be established for specific purposes (supplementary zones for particular fishing privileges, mineral exploitation, etc.), and the lateral lines of jurisdiction between adjacent states. Therefore, principles and techniques should be developed and acknowledged for the delimitation of contiguous zones in the adjacent sea areas—in which coastal states will be presumed to have limited specific rights for clearly defined purposes.

6. In the exact geographical-geometrical delimitation of all the limits of the territorial sea and any contiguous zones, the following principles and techniques should prevail, and should meet the requirements of most situations (subject to modification by mutual agreement):

(a) Begin by laying down the seaward limit of the territorial sea as the envelope of the arcs of circles whose radius is equal to the width of whatever belt of sea is under consideration—whether 3 miles, or any other width—measured outwardly from the coastline in question, including all islands—(properly, from the intersection of the plane of the low-water datum with the shore).

(b) Eliminate any impracticable or highly objectionable pockets of high sea that may appear in the envelope of arcs of circles, by simple, geometrical criteria.

(c) Consider the problem of bays, estuaries, ports, and other "inland waters" only after the seaward limit of the territorial sea has been laid down, and introduce a minimum number of straight lines to serve as the outer limits of inland waters, which thus serve as if they were parts of an artificial coastline in laying down the outer limit of the territorial sea. If the problem of providing a minimum belt of territorial sea 3 miles wide (or territorial sea width) were to arise, re-

verse arcs from the points of intersection of the outer envelope of arcs may be drawn (as on Fig. 2 above).

(d) Lay down the seaward limit of any contiguous zone or zones (contiguous to the territorial sea or to any zone beyond) that may be accepted by the international community by exactly the same techniques as those used in delimiting the territorial sea. That is, it should constitute the envelope of arcs of circles of any stipulated radius, measured from the low-water datum of the coastline in question; and any objectionable pockets of high sea should be eliminated by simple, geometrical criteria.

(e) Lay down any lateral jurisdiction limit or boundary, first through the territorial sea by a single straight line (except where islands make it unfeasible) from the low-water-datum terminus of the land boundary out to the point of intersection of the envelopes of arcs of circles of 3-mile (or territorial sea width) radius from the coasts of the two states.³⁸

(f) In extending a lateral jurisdictional limit through a "contiguous zone" out to any desired distance (beginning at the outer limit of the territorial sea), it may be laid down either on the "median line" principle (every point being equidistant from the nearest point or points on opposite shores) or as a series of straight lines connecting points of intersection of successive envelopes of arcs of radii, increasing by increments of 3 miles (or any other accepted unit) measured from the nearest points on opposite shores—that is, from the intersection of the low-water-datum plane with the coast.

Where islands are found, the following rule should be applied in determining whether they should be disregarded in laying down the lateral jurisdictional line: Draw parallel lines tangent to opposite ends or sides of the island which enclose the minimum area of water between island and mainland. If the water area subtended between island and mainland within the parallel lines is less than the area of the island, the island is taken into consideration as if it were part of the mainland. But if the water area exceeds the area of the island, the island is disregarded in laying down the lateral line through the contiguous zone.

(g) Lay down the median line, in any lake, gulf or bay (as in any river) as the line every point of which is equidistant from the nearest point or points on opposite shores, measured from the low-water datum. All islands should be disregarded except those which meet the test prescribed above in relation to the extension of any lateral jurisdiction limit through a contiguous zone.

(h) If the "edge of the continental shelf" is under consideration as the seaward limit of a contiguous zone, it seems advisable to indi-

³⁸ See the author's *International Boundaries*, Fig. 25 (p. 188), for the method of laying down such an extension of the boundary through the territorial sea. By laying down the 3-mile arcs from each country as if its neighbor's land were sea, an intersection of arcs from the two countries will be found, even where their land boundary terminates at a salient point.

cate a specific submarine contour and to disregard the theoretical physical submarine feature. This is because the place where the continental shelf ends and the "continental slope" begins (at a perceptible increase in slope), although commonly assumed to be at 100 fathoms below sea level (alternatively at 200 meters, which is slightly more), is now believed to average about 70 to 75 fathoms (or less than 150 meters); and in some areas there is no continental shelf in the proper sense of the term. In addition, beyond the continental shelf in the strict sense there are islands with "island shelves."

7. The practical difficulties of making reliable determinations of position, in latitude and longitude, and in relation to any seaward areas which are delimited, must be taken into consideration. This is especially true in areas of "contiguous zones" from which land features are not visible from points on or very near the surface of the sea. Determination of position with accuracy is feasible in many situations and instances only by means of electronic devices (in which distances are measured in millionths of a second of time required in the transmission of electrical impulses), most if not all of which will require the establishment and maintenance of shore stations at points precisely indicated on charts, on which the limits of the "contiguous zone" are also indicated. It may be necessary to establish the obligation of the state to erect and maintain such stations (when the limits of the contiguous zone have been internationally agreed to) depending upon the nature and magnitude of the operations involved in the seaward areas.

8. Codification of the principles and techniques of delimitation of all types of boundaries of the territorial sea and any contiguous zones is highly desirable. It is also to be desired that states will publish maps or hydrographic charts showing the limits of the territorial sea, and of any contiguous zone or zones, laid down in accordance with accepted delimitation principles and techniques, and showing also the precise location of any shore stations or aids to accurate determination of position by surface or aircraft.

THE LEGAL STATUS OF GERMANY

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I. THE HITLER AND DÖNITZ GOVERNMENTS

Hitler had been recognized by all foreign governments. Also during the last war the recognition was not withdrawn. One has therefore to assume that, from the point of view of international law, Hitler was the lawful government and representative of Germany. For the purposes of this article we need not deal with the question whether, according to German public law, he came to power, for instance, by means of a *coup d'état* or a perjury.¹

It is doubtful, however, whether Dönitz was Hitler's legal successor. It is true that Hitler had made him his successor in his political Last Will and Testament and had called him "*Reichspräsident*," Minister of War and Supreme Commander of the Armed Forces (*Befehlshaber der Wehrmacht*).² But Dönitz could exercise his governmental powers within a small part of Germany only. It is dubious how far he could have enforced his orders. Those who have dealt at all with the question whether Dönitz *de jure* or *de facto* exercised governmental powers within Germany and whether he could be regarded as the representative of Germany under international law have mostly answered it in the negative.³ Thus also the Swiss Federal Council stated in its session of May 8, 1945, that Switzerland could not recognize the Dönitz government "*pour des raisons de fond et de forme*."⁴ It could, however, be pointed out that according to National Socialist Constitutional Law as it was in force up to the capitulation, the laws and orders of the *Führer* were the supreme sources of law and that his powers were not limited. We need not deal with the question whether certain of his laws and orders of criminal contents violating general principles of law or natural law were also valid. For the transfer

¹ Arndt, *Süddeutsche Juristen Zeitung* (SJZ), 1948, p. 4; and Rudolf Laun, *Allgemeine Staatslehre* (7th ed., Hamburg, 1948), p. 57.

² Klein, *Neues Deutsches Verfassungsrecht* (Frankfurt/Main, 1949), p. 14.

³ Geiler, *Die gegenwärtige völkerrechtliche Lage Deutschlands* (Bremen, 1947), p. 13; Kaufmann, *Deutschlands Rechtslage unter der Besetzung* (Stuttgart, 1948), p. 12; Sauser-Hall, *Schweizerisches Jahrbuch für internationales Recht* (Zürich, 1946), p. 22; but see Kraske in *Juristische Rundschau*, 1949, p. 271, in whose opinion Dönitz was Hitler's lawful legal representative.

⁴ Report of the Bundesrat, *Schweizerisches Jahrbuch*, 1946, p. 202.

of the governmental powers to Dönitz was not effected by such a law. Furthermore, it is known that in general the German troops in the territory not yet occupied by the Allied Forces complied with Dönitz' orders. That is true in particular of the Supreme Command of the Armed Forces.

The Allied Powers, as far as it can be ascertained, refused to recognize German soldiers who continued fighting after the capitulation of the German Supreme Command as regular soldiers and did not capture and treat them as such. The Allied Powers could do this only on the assumption that the order of the German Supreme Command to stop fighting was valid. But the continuance of military discipline is the first condition for the validity of a military order. Military discipline exists only if orders are executed at least in general. The Allied Powers must therefore have assumed that the German Supreme Command could enforce its orders at least in general. On the other hand, military discipline and power of command are based upon the effectiveness of the organization of the state. They depend on it and must therefore end with it. Thus one arrives at the strange conclusion that the capitulation was regarded binding for all German soldiers because the military power of command was believed to exist, but that the Dönitz government was not recognized because its effectiveness (which is practically the power of command of the government) was said no longer to exist. We could add that the Allied Powers did not take the Dönitz government prisoner immediately after the capitulation, but for some time allowed it to "govern" in Flensburg. They even demanded that Friedeburg and Stumpf, the signatories of the capitulation of May 8, 1945, produce full powers of Dönitz as the Supreme Commander of all armed forces, a position Hitler himself had held. Furthermore, in his radio address of May 8, 1945, Churchill did not doubt that Dönitz was entitled to exercise governmental powers. On the contrary, he called him "leader."⁵

II. DOES GERMANY STILL EXIST AS A STATE?

Sovereignty is embodied in the nation. The German nation still lives and is organized within a territory. It has not merged in another state voluntarily, but has maintained the will to form a state. Consequently the opinion that Germany has ceased to exist as a state can only be based on the assumption that she has been annexed.

From the point of view of law, not military conquest but the declaration of the annexation is decisive. Otherwise a state continues to exist, as it can be proved by many cases of complete occupation of foreign states where the annexation was not declared. Thus also Oppenheim says:

Conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, *formally* annexes the territory. Such

⁵ Compare Kraske, *loc. cit.*, and Klein, *op. cit.*, p. 14.

annexation makes the enemy state cease to exist, and thereby brings the war to an end.⁶

But an annexation does not exist. The German armed forces were annihilated. The *debellatio* was effected. The Allied Powers, however, in their declaration regarding the defeat of Germany of June 5, 1945, 6 p.m., declared: "The assumption, for the purposes stated above, of the said authority and powers, does not effect the annexation of Germany."⁷ On the contrary, the above declaration was affirmed by the British liaison staff with the *Zonenbeirat* and by various international agreements and official statements showing that the Allied Powers recognize the continuance of the German state. Proclamation No. 1 of the Control Council of August 30, 1945, speaks of "Germany as a whole," and Proclamation No. 2 of the "German state" and "Germany."⁸ Minister McNeil declared in the British House of Commons on Nov. 5, 1945: "Germany has not ceased to exist as a state." At about the same time the Foreign Office confirmed this by the statement: "Germany still exists as a state and German nationality as a nationality."⁹ In accordance herewith also the parties to the ERP treaty assume that Germany still exists. For it states in Article 1, par. 3, that all assistance furnished pursuant to the agreement "shall constitute a claim against Germany." The aid shall constitute a claim not against the Bizonal area but against Germany, although according to Article 1, the help is furnished to the US/UK occupied area.¹⁰

Thus, at their annual meeting in Hamburg in April, 1947, the German university teachers of international law unanimously accepted a resolution proposed by Rudolf Laun, stating that Germany continued to exist as a state in the sense of general international law. This seems to us to be also the prevailing opinion abroad.¹¹

⁶ Oppenheim-Lauterpacht, *International Law* (6th ed.), Vol. I, p. 518, and Vol. II, p. 466; in the same sense Schätzel, *Wörterbuch des Völkerrechts* (Berlin and Leipzig, 1924-1929), Vol. I, p. 367, and Stödter, *Deutschlands Rechtslage* (Hamburg, 1948), pp. 57-58, with further references.

⁷ Official Gazette of the Control Council for Germany (Off.Gaz.CCG), Supp. 1, p. 7.

⁸ Military Government Gazette, Germany, British Zone of Control (Military Gazette), No. 5, pp. 26, 27; *Jahrbuch für Internationales und Ausländisches Öffentliches Recht (Jahrbuch)* (Hamburg), Vol. I, 1948, p. 188.

⁹ Quoted by Schwelb, this JOURNAL, Vol. 40 (1946), p. 812.

¹⁰ See Dross, *Deutsche Rechtszeitung (DEZ)*, 1948, p. 457; for further examples see Laun, *Reden und Aufsätze zum Völkerrecht und Staatsrecht* (Hamburg, 1947) (*Reden*), p. 19, and Stödter, *op. cit.*, pp. 95 and 117.

¹¹ *Jahrbuch*, Vol. I, 1948, p. 6; further references in Stödter, *op. cit.*, p. 60, and Oberlandesgericht (OLG), Tübingen, in *Rechtsprechung zum Wiedergutmachungsrecht (RzW)*, 1949-50, p. 32; Oesterreichisches Bundesgericht, *Juristische Blätter*, 1946, p. 142, and 1947, p. 421; U. S. ex. rel. Kessler v. Watkins, 163 Fed. (2d) 140, *Jahrbuch*, 1949, p. 821; Obergericht, Zürich, *Schweizerisches Jahrbuch*, 1946, p. 208; report of the Schweizer Bundesrat, *ibid.*, p. 202; Schindler, *ibid.*, p. 210; Sauser-Hall; *ibid.*, p. 25; Czapski (Holland), *Neue Justia*, 1948, p. 108; Mann (Great Britain), *SJZ*, 1947, p. 465;

If Germany has not been annexed, she cannot have become a condominium, for a condominium is nothing but a territory which has been Federal Republic was permitted by the Occupation Statute of May 12, 1949. It distinguishes clearly between the German Reich (Germany) and jointly annexed by two or more Powers.¹²

Also the establishment of the *Bundesrepublik Deutschland* has not influenced the continuance of the German Reich. The establishment of the the Federal State, for instance, when speaking of the legislative, executive, and judicial powers of the Federal State (Nos. 1 and 4), and of "claims against Germany" (No. 2b). Furthermore § 9 of the 35th and the 37th *Durchführungsverordnung* of the Federal Banking Commission to Law No. 63 of the Military Government of Germany (*Umstellungsgesetz*)¹³ speak of German territory outside the three Western Zones.

The Control Council which is competent in matters regarding Germany as a whole still exists. The institution as such has not been abolished. At present it is not operating.¹⁴ Its laws are still considered to be valid. Thus the Charter of the Allied High Commission for Germany¹⁵ states in Article I, par. 4: "Legislation of the Occupation authorities enacted before the effective date of the Occupation Statute shall remain in force. . . ." The Control Council Proclamation No. 1 establishing the Control Council is not excepted.

Furthermore, according to the Allied Powers a state of war exists—between them and *Germany* and not the Federal Republic. Thus a British "Enemy Order Germany 1949" was issued, an amendment to the Trading with the Enemy Act.¹⁶

All this seems to indicate that in the opinion of the Occupation Authorities Germany continues to exist even now. This is confirmed by the fact that both the German Federal and the Allied authorities recognize only a *German* and not a Federal nationality.

Rheinstein, in *Michigan Law Review*, 1948, p. 25; British Foreign Office in *Rex v. Bottrill ex parte Küchenmeister*, [1946] 2 All Eng. L. R. 434, quoted by Schwelb, *loc. cit.*, p. 812; but see Kelsen, this JOURNAL, Vol. 38 (1944), p. 689.

¹² In this sense the prevailing opinion since Laun, "Die Zeit," March 13, 1947, reprinted in *Reden*, p. 16; Stödter, *op. cit.*, p. 74; Schlochauer, *Archiv für Völkerrecht (Archiv)*, 1948, p. 196; Dölle-Zweigert, *Kommentar zum Gesetz 52* (Stuttgart, 1947), p. 8; Geiler, *op. cit.*, p. 10; Zinn, *SJZ*, 1947, p. 10; Menzel, *Jahrbuch*, Vol. I, 1948, p. 75; but see Kelsen, *loc. cit.*, p. 692, and *ibid.*, Vol. 39 (1945), p. 518; Quincy Wright, this JOURNAL, Vol. 41 (1947), p. 50; Lewald, *Neue Juristische Wochenschrift (NJW)*, 1948, p. 381; OLG, Tübingen, *RzW*, 1949. The expression "condominium" is employed in the strict sense of the continental theory (see Menzel, *Jahrbuch*, Vol. I, 1948, p. 74).

¹³ *Verordnungsblatt für die britische Zone (VOBl.br.Z.)*, 1949, pp. 399, 473 and 502.

¹⁴ Accord: OLG, Frankfurt/Main, *SJZ*, 1950, 347; Dernerde, *Justiz und Verwaltung (JuV)*, 1950, p. 27.

¹⁵ *VOBl.br.Z.*, 1949, p. 406.

¹⁶ *Hamburger Hafen Nachrichten*, May 1, 1949, p. 4; also Norway considers herself to be in a state of war with Germany (*Fairplay*, 1949, p. 426).

According to Article 116 of the Basic Law¹⁷ those persons are Germans in its sense who possess German nationality.

The legislation of the Federal Republic distinguishes between itself and Germany. In particular the Basic Law speaks in Article 23 of parts of Germany the Federal Republic does not yet comprise, while §§ 7, 17 and 26 of the *Gesetz über die Eröffnungsbilanz in Deutscher Mark und die Kapitalneufestsetzung* of August 21, 1949¹⁸ differentiate clearly between the whole of Germany and her parts, namely, the *Währungsgebiet* and the parts of Germany outside the *Währungsgebiet*. The administrative directive of July 5, 1950,¹⁹ passed by the Federal Government and the Federal Council concerning the income tax declares in No. 1 that the territory of the four Occupation Zones and Berlin is considered to be German territory (*Inland*) in the sense of the income tax legislation. The Basic Law is rather built up on the assumption that it and together with it the Federal Republic are only of transitory duration. In Article 146 it refers to a future Constitution (now the Federal Republic has no Constitution but only a Basic Law) which will come into force when it is agreed upon by the German nation in a free decision. In the preamble it calls upon the whole German nation to complete the unity and freedom of Germany in free self-determination. Thus it has been assumed that the Federal Republic by no means succeeded the Reich in all respects and that the creation of a new state was not intended.²⁰

The (Eastern) *Deutsche Demokratische Republik* is evidently of the same opinion that Germany still exists. Article 1 of its Constitution²¹ states that Germany is an indivisible republic. According to Article 1, par. 4, there is—as well as in the West—only one German nationality. The Control Council is still recognized. All Western laws violating the agreements between the four Occupation Powers are considered to be null and void,²² among others, the Basic Law and the Occupation Statute.

We may therefore assume that Germany continues to exist²³ at the present time and is a subject of international law. She can therefore have

¹⁷ *VOBl.br.Z.*, 1949, p. 176.

¹⁸ *Ibid.*, p. 419.

¹⁹ *Beilage zum Bundesanzeiger* No. 127 of 1950.

²⁰ *Dienststrafhof, Deutsche Verwaltung (DV)*, 1949, p. 497; Grewe, *DRZ*, 1949, p. 315.

²¹ *Gesetzblatt der Deutschen Demokratischen Republik*, 1949, p. 6.

²² Grotewohl, *Deutscher Volktrat—Informationsdienst (DVB)*, 2nd year, No. 1, p. 8.

²³ Accord: Oberster Gerichtshof für die britische Zone in Köln (*OGH, Köln*), *DRZ*, 1950, pp. 14 and 258; Kammergericht, Berlin, *DRZ*, 1949, p. 543; Landesverwaltungsgericht, Hannover, *DV*, 1949, p. 70; Oberlandesgerichte, Hamburg, *SJZ*, 1949, p. 785; Frankfurt/Main, *ibid.*, 1950, p. 347; Nürnberg, *ibid.*, p. 426; Rietzler, *ibid.*, 1949, p. 786; Ostertag, *RzW*, 1950, p. 254; Dönhoff *Betriebsberater*, 1950, p. 414; probably also Landgericht, Leipzig, *ibid.*, p. 419; but see Kluge, *SJZ*, 1950, p. 426; Landgericht, Stuttgart, *Betriebsberater*, 1950, p. 409.

rights and duties under it.²⁴ We may furthermore assume that the *Bundesrepublik Deutschland* as well as the *Deutsche Demokratische Republik* are both administrative and partly self-governing units as the Bizonal Area has been. Though they are not recognized generally, the governments of both republics may be regarded as *de facto* governments.

When the question was examined whether Germany had been annexed, we had taken it for granted that annexation gives a valid title under international law. But doubts have often been raised against the validity of annexation—doubts not only against annexations as the result of an aggressive war forbidden by the Briand-Kellogg Pact,²⁵ but against any kind of annexation (by force).²⁶

One of the main arguments against the validity of annexations is that they usually violate not only the sovereignty of other states, but also certain rights which have more or less been recognized under international law.

The main stress could be laid upon the principle of the self-determination of nations. This principle was proclaimed by President Wilson in his famous 14 Points. The belligerents accepted them. Ever since, this principle, supported by the conception of the "*Nationalstaat*," has been gaining ground. It has been recognized in the Atlantic Charter. Thus, according to some authors, the principle of the self-determination of nations is already a part of the international law of today.²⁷

The principle would have to be carried through by plebiscites of the inhabitants of the disputed territories. In order to assure that the plebiscites be recognized by both parties, they would have to take place after a longer period of neutral occupation (granting equal rights to both parties and providing for about the same guarantees as were given in the Saar plebiscite of 1935). Nevertheless the difficulties on the important question as to who should be entitled to vote should not be overlooked. They could possibly be solved to the satisfaction of both parties, if—following the example of the Westphalian Treaties of 1648—the last year before the annexation or other change by force would be agreed upon as the so-called

²⁴ Mosler, *SJZ*, 1947, p. 362; Klein, *op. cit.*, p. 35; OLG, Tübingen, *RsW*, 1949/50, p. 34; compare Ostertag, *RsW*, 1949/50, p. 254; further references in Stödter, *op. cit.*, p. 86.

²⁵ Compare Oppenheim, Vol. I, p. 525 and Scheuner, *Die Friedenswarte*, 1949, p. 85.

²⁶ Schätzle, *Archiv*, 1949, p. 20; Grewe, *Ein Besatzungsstatut für Deutschland* (Stuttgart, 1948), pp. 51–52; Maurach, *Ostwärts der Oder und Neisse* (Hannover, 1949), p. 102; Sauser-Hall, *Schweizerisches Jahrbuch*, 1946, p. 27; Hold-Ferneck, *Jahrbuch des Völkerrechts* (Leipzig, 1932), Vol. II, p. 109; Budde, *Gibt es noch eine deutsche Aussenpolitik* (Hamburg, 1947), p. 85; Resolutions of the German University Teachers of International Law at their annual meetings in Hamburg (Resolutions), 1950, No. 2, *Justiz und Verwaltung*, 1950, p. 234.

²⁷ Resolutions, 1948, *Jahrbuch*, Vol. I, 1948, p. 7; Laun, *Hamburger Freie Presse (HFP)*, April 5, 1949, p. 2. Self-determination is considered to be a dominating principle, but not to be actual law, by Scheuner, *Die Friedenswarte*, 1949, p. 92; compare Grewe, *op. cit.*, p. 53, and Grotewohl, *DVR*, 2nd year, No. 1, p. 7.

Normal Year. This year would be the basis for deciding the question who was to be recognized to be an inhabitant of the territory in dispute and therefore entitled to vote.²⁸

The development towards the recognition of the principle of self-determination is to be welcomed. For, if the inhabitants of a territory should, in a truly free and just plebiscite, decide for one of the states claiming the territory, the neighbor would have no moral right to continue pressing his claim. Only minor questions concerning, for instance, the protection of minorities and economic prerogatives would remain.

Not only is the right of self-determination endangered by annexations. In most cases annexation means the acquisition of territory inhabited by people of a nationality different from that of the conquering state and speaking a different language. If the population of the annexed territory should be evacuated, the right to the permanent residence of one's forefathers²⁹ would be violated; if the population should, however, remain, the right of being brought up in one's mother tongue would be violated.³⁰ If this human right has so far not been recognized generally, this opinion deserves our attention all the more so because it is the logical consequence of the rule laid down in the international treaties concluded after the first world war to safeguard national minorities, namely, the rule that the children of the national minority shall be instructed in public schools in their mother tongue.³¹ This rule is confirmed by the agreement of September 5, 1946, between Austria and Italy³² granting (in Art. 1 a) the German minority the same rights, and by the Commission for Minorities and Discrimination, which, in its report to the United Nations Economic and Social Council, demands that minorities have schools in their mother tongue.³³

Furthermore, new duties of a citizen would be forced upon the parts of the population concerned, ties to their old home country would be destroyed, private property rights and even professional possibilities would be infringed. Therewith their general human rights would be endangered.

It is only when the inhabitants of the annexed territory agree to the annexation, that neither the principle of self-determination nor the other rights will be violated. Therefore, unless not *all* annexations (by force) are held to be unlawful, the difference between valid and invalid annexations could possibly be found not so much in the mode of acquisition (whether

²⁸ Compare Laun, *Die Welt*, Dec. 18, 1948, and *Die Lehren des Westfälischen Friedens* (Hamburg, 1949).

²⁹ Maurach, *op. cit.*, p. 119; Laun, *loc. cit.*, note 27, above, p. 2; Resolutions, No. 5, 1947, and No. 4, 1950, *Jahrbuch*, Vol. I, 1948, p. 8, and *Justiz und Verwaltung*, 1950, p. 134.

³⁰ Laun, *Die Lehren des Westfälischen Friedens*, p. 44.

³¹ Details in Laun, *Wörterbuch*, Vol. II, p. 82, at p. 100.

³² Reprinted in *Die Friedensverträge* (Heidelberg, 1947).

³³ According to Hertz, *Die Friedenswarte*, 1948, p. 45.

through a war of aggression or not) but in the attitude of the inhabitants of the annexed territory—whether they agree to it or not.

III. ARE THE HAGUE REGULATIONS APPLICABLE TO GERMANY?

Generally it has been concluded from the continuance of Germany that the Hague Regulations of 1907 on the Laws and Customs of War on Land are applicable to Germany.³⁴

This opinion has to a certain degree been confirmed by the American Military Government and by Kelsen. The Military Government, for instance, emphasized in No. 1 of an internal order of April 1, 1947, concerning the occupation of houses within the 1st military district of Bavaria, that the instructions were drawn in accordance with the above Hague Regulations. Likewise, the Standing Operation Procedure No. 37 of June 11, 1947, shows that all claims upon German private property must be made in accordance with the protective rules of international law. Furthermore, form MGR 17/403, on funds left behind by the enemy or captured, considers them as ordinary booty according to the Hague Regulations.³⁵ Kelsen³⁶ points out that the fiction of a continuance of the German State was politically unfavorable because, if this were true, the Occupying Powers were entitled only to maintain an *occupatio bellica* according to the Hague Regulations.

By prohibiting any violation of the laws and customs of war, and therefore of the Hague Convention, under all penalties including the death penalty,³⁷ the occupants themselves have taken the point of view that the Hague Regulations are applicable.³⁸ If they are applicable at all, they must, however, be applicable for and against the Occupying Powers. In our opinion, the applicability of the Hague Regulations must be derived from the fact of the occupation and is not, as some authors hold, affected by the type of occupation, by conditions in Germany, or by the questions whether a state of war exists or whether hostilities continue.

³⁴ Resolutions, No. 3, 1947, *Jahrbuch*, Vol. I, 1948, p. 6; Laun, *Hamburger Freie Presse*, April 5, 1949; Schlochauer, *Archiv*, 1948, p. 203; Stödter, *op. cit.*, pp. 171 and 228; for both see, however, note 71; Budde, *op. cit.*, p. 84; Armstrong as quoted in *Hamburger Freie Presse*, Oct. 8, 1947; Kammergericht in *Juristische Rundschau*, 1949, p. 48, probably also *OLG*, Tübingen, *EzW*, 1949/50, p. 23; Klein, *op. cit.*, p. 35. For an analogous application see Heinemann, *Die Welt*, Nov. 15, 1947; but cf. Kaufmann, p. 16, and the official British view: Duncan Wilson, *Die Welt*, Nov. 22, 1947; General Robertson, as quoted by Heinemann, *ibid.*, Nov. 15, 1947; Jennings, *Monatsschrift für Deutsches Recht*, 1948, p. 6. For further British opinions see Stödter, *op. cit.*, pp. 153-154; compare Rheinstein, *Michigan Law Review*, 1948, p. 27.

³⁵ For the two first examples see *Hamburger Allgemeine Zeitung*, Sept. 12, 1947; for the third and other examples see Stödter, *op. cit.*, p. 178.

³⁶ In the *Kurier*, No. 119, 1948, as quoted by Grewe, *op. cit.*, p. 59; see also this *JOURNAL*, Vol. 38 (1944), p. 518.

³⁷ Ordinance No. 1, Art. I, par. 20, *Military Gazette* No. 2, p. 2.

³⁸ Laun, *Reden*, p. 49.

Not the state or its authorities, but the population of the occupied territory was to be protected because of humanitarian reasons.³⁹ This emanates from paragraph IX of the Hague Convention under which the population and the belligerents are under the protection and empire of the principles of international law and the laws of humanity. The population of an occupied territory, as well as the captured soldiers, are most in need of the protection of the Hague Regulations when their armies and their state have collapsed and can therefore do nothing to protect them. International law would abandon its own principles if it would refuse the protection so carefully developed at the moment when it is needed most.⁴⁰

The Hague Regulations contain only the minimum of legal security and protection any citizen of an occupied territory is to be granted even under the pressure of military necessities. If the Hague Regulations are applicable during the course of actual hostilities, then they must apply the more after hostilities have been terminated,⁴¹ without regard to the conditions in the occupied country or to the type of occupation. Thus it seems to have been assumed generally that the Occupying Powers have—apart from rights transferred upon them by treaty—in the case of an *occupatio pacifica* no more rights than in the case of an *occupatio bellica*. On the contrary, the opinion was held that under the *occupatio mixta* regulated by an armistice the occupant had no more rights than under the *occupatio bellica*.⁴² Therefore the Hague Regulations are in force until the occupied territory is definitely incorporated⁴³ or evacuated by the Occupying Powers.

In spite of all the destruction caused by the war there existed at the time of the capitulation of the German Supreme Command German representative organs exercising supreme authority with respect to Germany. These representative organs were the Dönitz government, assisted by the Supreme Command, the military organization and the administrative body. From the day of the capitulation the occupants prevented the German Government as well as the Supreme Command from exercising their functions (the merely nominal activity of the government in the first days after the capitulation is in this connection of no importance), and even took all the members prisoner. They destroyed the old political and economic order and set up a new one. When the Occupying Powers created these conditions, they acted upon their free decision. According to the principle of

³⁹ Laun, *Haager Landkriegsordnung* (5th ed., Hannover, 1950), p. 85; but see Jennings, *loc. cit.*, 1948, p. 6.

⁴⁰ Laun, *loc. cit.*; Jellinek, *Deutsches Handwerksblatt*, 1949, Heft 1.

⁴¹ Accord: Laun, *Haager Landkriegsordnung*, p. 85; Jellinek, *loc. cit.*; Budde, *op. cit.*, p. 84; probably also Schlochau, *DEZ*, 1947, pp. 119–120; Luther, *NJW*, 1950, p. 441; Ross as quoted by Schätzle, *Archiv*, 1949, p. 127; compare Grewe, *op. cit.*, p. 83.

⁴² Strupp, *Zeitschrift für Völkerrecht*, Vol. XI, p. 265.

⁴³ O. T. Roed as quoted by Rotholz, *Archiv*, 1948, p. 141.

estoppel, which is a general principle of law—we need only refer to the related principle of *venire contra factum proprium*—and is part of international law as well, the Occupying Powers therefore cannot justify any violation of the Hague Regulations by referring to the “conditions without precedent.”⁴⁴

The authors of the Hague Regulations had realized that they could not foresee all possible situations. Thus, according to paragraph IX of the Convention, the Hague Regulations were to be applied also in those cases not expressly provided for in the Regulations.

That the Hague Regulations are applicable to Germany clearly emerges also from the growing recognition of human rights. On December 10, 1948, the General Assembly of the United Nations proclaimed a “Universal Declaration of Human Rights as a standard of achievement for all peoples and nations”⁴⁵ which the majority of the members of the Third Committee had considered, however, not to be binding on them. These principles are on the whole recognized not only by the Members of the United Nations, but also by non-members. This is shown, for instance, by the general and wide recognition of human rights in the resolution of the 1947 Congress of German University Teachers of International Law stating that general human rights, for the violation of which the Hitler régime had been justly reproached and which had furthermore often been disregarded by both parties in the last war as well as in former wars, are a self-evident supposition and therefore part of the law of nations.⁴⁶ It is further shown by the fact that human rights are recognized in many constitutions. We need only refer to the Constitution of the United States, to Article I of the Basic Law of the Western Federal Republic, and to Articles 6–18 of the Constitution of the Eastern “*Deutsche Demokratische Republik*.”

International law is not created by state laws but by international treaties, or it develops through an equal and general evolution of opinions on it. The United Nations Declaration was accepted by 48 votes to none, while 8 delegates abstained from voting.⁴⁷ One of the most important countries not represented in the United Nations, *i.e.*, Germany, recognizes similar human rights. These circumstances and the fact that international law is more and more turning to the individual lead to the conclusion that human rights are more than mere progressive ideas. By some authorities whom we follow they are already considered to be valid rules of inter-

⁴⁴ Laun, *Jahrbuch*, Vol. I, 1948, p. 18; Menzel, *ibid.*, p. 66; Schlochauer, *Archiv*, 1948, p. 203; Stödter, *op. cit.*, pp. 163, 168, 170, 175; compare Schick, this JOURNAL, Vol. 41 (1947), p. 780.

⁴⁵ Reprinted in this JOURNAL, Supp., Vol. 43 (1949), p. 127; also in *Die Friedenswarte*, 1949, p. 35.

⁴⁶ *Jahrbuch*, Vol. I, 1948, p. 6; see also Laun, *Die Menschenrechte* (Hamburg, 1948), pp. 16–17.

⁴⁷ Stillschweig, *Die Friedenswarte*, 1949, p. 7.

national law.⁴⁸ That they cannot be enforced at present is a different matter. The Hague Regulations cannot always be enforced and are yet considered to be valid international law.

Article 2 of the Declaration of Human Rights states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind. . . . Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty." That indicates that human rights as set forth in the Declaration are generally applicable to occupied territories and therefore also to Germany.

It certainly cannot be assumed that these human rights have to be and can be applied in their full extent to territory under military occupation. Suffice it to refer to Articles 13 and 21 of the Declaration in which the right to freedom of movement, including the right to leave one's country, and the right to take part in the government of one's country are laid down. But it may be assumed that any Occupying Power not granting the various human rights violates international law unless a special legal basis for the non-observance is given. The Occupying Powers are bound by Article 43 of the Hague Regulations generally to observe the national laws of the occupied country. They should still more be bound to observe international law which today more than ever claims predominance over national law. For instance, the Constitution of the *Deutsche Demokratische Republik* declares in Article 5 (I), that international law is part of the national law and binding for the government.

A legal basis for not observing certain human rights can probably be seen in the Hague Regulations. Other rules of international law permitting a government to violate fundamental human rights are not known to the author. A renunciation by a government—in particular *ex ante*—of fundamental rights of the individual is surely *contra bonos mores* and therefore invalid. That the Hague Regulations are not worded as exceptions from human rights but simply as limitations of what is allowed can be explained by the fact that at the beginning of this century a code of human rights did not exist. Nevertheless, it is evident that the Hague Regulations also are based on the assumption that general human rights exist. Thus human rights are recognized, as far as life, honor, family, and private property are guaranteed by Articles 46, 47 and 56; while Articles 48, 49 and 51 (the rights to collect taxes, dues, tolls, contributions, etc.), 50 (the right to inflict penalties), and 52 and 53 (the right to requisition goods and services) are nothing but exceptions from human rights.

⁴⁸ Laun, *Europäische Zukunft*, 1949, p. 10; Donnedieu de Vabres in his opinion on the French Law on War Criminals of Sept. 15, 1948; see also Stillschweig, *loc. cit.*, pp. 9–10.

Measures which are not permitted by the Hague Regulations, and which, however, infringe upon human rights, could, therefore, in default of another legal basis, on the whole be considered unlawful under the law of nations.

The Hague Regulations are applicable irrespective of the question whether the U.S.S.R. is a party to the Convention. For paragraph 4 of the preamble to the Convention states that it was concluded in order to define more precisely the general laws and customs of war. Therefore the opinion is generally held that the Hague Convention confirmed universal international law.⁴⁹ Otherwise one party could escape the limitations of the Hague Regulations by drawing into a conflict a Power not bound by them. Article II of the Hague Convention, under which its provisions are only binding in case of war between the Contracting Powers, is therefore, at least in principle, irrelevant.

Furthermore, the non-fulfilment of international obligations by Germany cannot justify the non-application of the Hague Regulations with regard to present-day Germany,⁵⁰ for the objects of the protective rules are not the governments but the inhabitants. Otherwise two states (the two parties at war with each other) could change universal international law confirmed by the Hague Convention by concurring action. This cannot be lawful because the interests of neutral countries would be endangered. Furthermore, the following questions would have to be answered: Who should be entitled to decide whether a state had violated its obligations? Would the violation with regard to one enemy have consequences also with regard to another enemy? Would the non-application towards the violator have to be proportionate to his violations?

The non-application of the Hague Regulations in this connection has sometimes been based on the principles of reprisals. But even these principles cannot justify their non-application, even if the fundamental doubts as to their rightfulness are not shared.⁵¹

According to their definition, reprisals are said to be a means to force the enemy to act in accordance with international law and to prevent him from continuing violations of the same.⁵² Therefore reprisals have to be stopped as soon as the enemy has terminated his illegal acts.⁵³ If a

⁴⁹ *Nürnberger Urteil* (Schwann Verlag, Düsseldorf, 1946), p. 59; see, in particular, Stödter, *op. cit.*, p. 162; Laun, *Haager Landkriegsordnung*, pp. 21, 22; Geiler, *op. cit.*, p. 14; Grewe, *op. cit.*, p. 109; Jellinek, *Deutsches Handwerksblatt*, Heft 1, 1949; Dölle Zweigert, *Gesetz 52*, p. 6; *OGH, Köln, NJW*, 1950, p. 26.

⁵⁰ Laun, *op. cit.*, p. 85, Grewe, *op. cit.*, p. 111, and the prevailing opinion; but see references in Stödter, *op. cit.*, p. 108.

⁵¹ Compare Stödter, *op. cit.*, p. 109; Oppenheim, Vol. II, p. 448; Laun, *op. cit.*, pp. 50 ff., 113, 114; Liszt, *Das Völkerrecht* (Berlin, 1925), p. 441.

⁵² Strupp, *Wörterbuch*, Vol. II, p. 350; see also Grewe, *op. cit.*, p. 112; according to Stödter, reprisals aim at compensation for damage.

⁵³ Stödter, *op. cit.*, p. 111; Grewe, *op. cit.*, p. 112.

state injured by unlawful acts of its enemy would simply disregard all the Hague Regulations, it would violate the principle of proportionateness inherent in the conception of reprisals and would commit an excess of reprisals not allowed by international law.

The applicability of the Hague Regulations with regard to Germany has been doubted by several authors on the ground that Germany, by her alleged unconditional surrender, had renounced all rights under international law⁵⁴ and therewith also those contained in the Hague Regulations.

It is true that the capitulation is valid, but only the armed forces have capitulated. While in the case of Italy and Japan the capitulation documents were signed by representatives of and on behalf of the Japanese Emperor and Government or by Marshal Badoglio as the head of the Italian Government and in its name respectively,⁵⁵ in the case of Germany only commanders of armed forces signed both capitulation documents which are headed "Acts of military surrender," and signed "on behalf of the German Command."⁵⁶ According to their own statements, therefore, the persons who signed the documents had limited powers only. This corresponds to the general competence of military commanders. They are, naturally, competent only to sign military documents—and capitulations are purely military affairs—but not to terminate the juridical existence of their state.⁵⁷ On the contrary, the state has to continue to exist if the capitulation is to have any effect. If the military commanders had the power to terminate the juridical existence of the state by their signature, there would from this moment on exist no juridical organization bound by the signature. For the state in whose name the statement was made would exist no more.⁵⁸ Accordingly, both capitulation documents expressly state in Art. 4 that the military surrender is without prejudice to any general instrument of surrender imposed by the United Nations. Any contractual assurance of political aims is therefore not combined with the capitulation; had it been contained in the documents, it would nevertheless have been invalid.⁵⁹

Thus it is shown that neither the German Government nor the German State as such capitulated unconditionally. Though Germany through her Supreme Command renounced the right of military resistance under the

⁵⁴ E.g., Pitman B. Potter, this JOURNAL, Vol. 43 (1949), p. 324, who says, however, that the actions taken by the occupants "had no place in accepted law" and were "strictly forbidden."

⁵⁵ *Jahrbuch*, Vols. II/III, 1948, pp. 428 and 415 resp.; see also Stödter, *op. cit.*, p. 32.

⁵⁶ Off. Gaz. CCG, Supp. No. 1, and *Jahrbuch*, Vol. I, 1948, pp. 185-186.

⁵⁷ Verdross, *op. cit.*, pp. 81, 104; Stödter, *op. cit.*, p. 28; Sauser-Hall, *op. cit.*, p. 54; Schlochau, *Archiv*, 1948, p. 192; OLG, Tübingen, *EzW*, 1949/50, p. 33; Laun, *op. cit.*, p. 119.

⁵⁸ Laun, *Eeden*, p. 88.

⁵⁹ OLG, Tübingen, *EzW*, 1949/50, p. 33; Grewe, *op. cit.*, p. 20; see also Menzel, *Europa Archiv*, 1947, p. 1014; Stödter, *op. cit.*, p. 30; Kraske, *Juristische Rundschau*, 1949, p. 102; Klein, *op. cit.*, p. 18.

supposition that this unconditional surrender is subject to the general (universal) rules of international law, she did not renounce her rights as a subject of international law.

If, for instance, a fortress capitulates unconditionally, it neither intends nor effects a renunciation of rights under international law, but only that the enemy does not grant the capitulating party any special rights.

The revelations made by Churchill in a debate on Germany on the history of the Allied demand for an unconditional surrender show very clearly indeed that they did not intend to demand more and did not understand by it more than the unconditional cessation of hostilities on the military sector and, on the political sector, that the Allied Powers were not bound by any concessions (e.g., the famous 14 Points of President Wilson).⁶⁰

Neither the assumption that the war was a war of intervention nor the special war (or intervention) aims of the Allied Powers allow the conclusion that the Hague Regulations are not applicable or that their application is to that extent restricted.⁶¹ We need not examine whether on principle all interventions not agreed upon by treaty are, as some authors⁶² and we, too, hold, illegal. The general rules on warfare and on occupation are to be applied as well in the case of intervention, because a war of intervention is also a war⁶³ and the Hague Regulations, as we have shown above, contain a minimum of rights.

It is true that fundamental differences between the belligerents in political matters, and political demands of Hitler were the main causes of the war. But no one could overlook the consequences if the aim of one belligerent to abolish certain institutions of his enemy would exempt him from the obligations under the Hague Convention. That would only mean that the less scruples a party has and the more it strives for power, the less it is bound by the Hague Convention. Besides, as far as it is known,

⁶⁰ See Schlochauer, *Archiv*, 1948, p. 192, quoting Eden in the same sense; for the background of the demand for unconditional surrender see Stödter, *op. cit.*, p. 33.

⁶¹ But in this sense Zinn, *SJZ*, 1947, p. 6; Geiler, *op. cit.*, p. 12; further references in Stödter, *op. cit.*, p. 133; Stödter arrives at a similar conclusion as he points out on pp. 231 and 237, after having declared that the Hague Regulations were applicable to Germany, that the right of the occupants to realize their (military and political) war aims by means of the occupation is an essential characteristic of the powers of the occupant which has only been hinted at in Art. 43 of the Hague Regulations. Schlochauer, *Archiv*, 1948, p. 204, attributes the same effect to the "*Besatzungszweck*" (aim of the occupation); see also v.d.Decken, *Jahrbuch*, Vol. I, 1948, p. 25.

⁶² E.g., Hold-Ferneck, *op. cit.*, Vol. II, p. 215; Rühland, *Archiv*, 1949, p. 124; see also Hershey, *Essentials of International Public Law* (New York, 1912), note 18, p. 153; further references in Schlochauer, *Archiv*, 1948, p. 198, and Stödter, *op. cit.*, p. 137.

⁶³ Stödter, *op. cit.*, p. 136; Liszt, *op. cit.*, p. 442.

the occupants based their attitude principally upon the actual conditions in Germany rather than upon their aims.⁶⁴

The doubts as to the rightfulness of an Allied intervention in Germany are to a certain extent shared by the very supporters of the theory of intervention. They demand that the aims of the intervention keep within certain limits; that the intervention must not create a state of permanent dependency or control of any kind, and that intervention should rather aim at the establishment of a political system in the occupied territory endowed with the democratic right of self-determination also against the intervening Powers.⁶⁵ It appears, however, that the occupants do not have the intention of keeping within such limits. We have merely to consider the Ruhr Statute and the Occupation Statute.

The doctrine of intervention is closely connected with the doctrine of a trusteeship of the Occupying Powers.⁶⁶ The followers of this doctrine hold that the occupants are not bound by the Hague Regulations insofar as the trusteeship requires or permits it. How far they cannot say, any more than they can define the rights and duties of the trustees. Neither can they show a legal title for the trusteeship. A treaty with Germany has not been concluded. The agreements between the Allied Powers cannot be accepted as a basis for such a trusteeship because they are one-sided acts.⁶⁷

We cannot share the opinion⁶⁸ that the United Nations could endow a state with a trusteeship over Germany. This could only be the case if the United Nations had, by a treaty with Germany, acquired a legal title. Besides, the Occupying Powers do not derive their authority from the United Nations. The United Nations has not transferred a trusteeship to them. Furthermore, the Occupying Powers have not entered into any obligation concerning Germany and protecting the German population, but have on the contrary opposed the idea that their powers with respect to Germany were limited. A trusteeship without obligations, however, amounts practically to a dictatorship.

The general non-application of the Hague Regulations cannot be explained as a means of general (collective) punishment in the sense of Article 50 of the Regulations. The Regulations provide for general punishment only with respect to small groups of persons. Article 50

⁶⁴ Wilson, *Die Welt*, Nov. 22, 1947, p. 2; General Robertson and U. S. War Department as quoted by Stödter, *op. cit.*, p. 154-157.

⁶⁵ E.g., Grewe, *op. cit.*, p. 135-136.

⁶⁶ E.g., Menzel, *Jahrbuch*, 1943, Vol. I, p. 81; *Rechtsgutachten des Kaiser-Wilhelm-Institutes*, *Jahrbuch* II/III, 1948, p. 369, at p. 373; see also Stödter, *op. cit.*, p. 144, and Mann, *SJZ*, 1947, p. 465.

⁶⁷ Schlochauer, *loc. cit.*, p. 199; Stödter, *op. cit.*, p. 139; Laun, *Haager Landkriegsordnung*, p. 130.

⁶⁸ Schlochauer, *loc. cit.*

limits the previous principle permitting the punishment of all the inhabitants of a place. The principle of the restricting of general punishment has been further developed in recent times. The Red Cross Conference in Geneva in 1949 passed a resolution that in future the punishment of an inhabitant of occupied territory for a crime he had not committed personally, and general (collective) punishment directed against the life and property of such inhabitants are to be considered as violations of international law.⁶⁹

As it is shown by paragraph 6 of the Hague Convention, collective punishment can be inflicted only in order to safeguard military necessities and not, for instance, in order to collect reparations.⁷⁰

The penalties provided for in Article 50 of the Hague Regulations are "money or other penalties." The fact that money has been enumerated specifically has led to the conclusion that, in the conception of the parties to the Hague Convention, this was the main penalty, and the "other penalties" were to be less incisive than fines.

Furthermore, according to the wording of Article 50, the persons subject to collective punishment must be jointly and severally responsible. This means evidently that the mere living and working side by side is not a sufficient basis for general punishment. At least a certain amount of personal responsibility is necessary. By stating that through terror Hitler came to power and through terror he maintained power, the late President Roosevelt recognized that the majority of Germans are not personally responsible for the unlawful acts of Hitler violating in particular human rights and international law.⁷¹

If the general non-application of the Hague Regulations is examined from this point of view, the principal measures of the occupants will probably be found not to coincide with the above principles of permissible general punishment.

The Occupation Statute cannot make any difference as to the international law applicable to Germany. It has been issued exclusively by the Occupying Powers. In paragraph 3 of the Statute, the Occupying Powers have reserved the right to interpret, to change, and even to withdraw it. The Statute cannot make any difference because, otherwise, a one-sided act of the occupant could undermine the Hague Regulations and change universal international law.

Since the Hague Regulations are applicable to Germany, the retention of German prisoners of war beyond the duration of military operations is or was illegal, unless the retention was caused by serious difficulties, especially in the field of transport. This is also the import of Article 20 of the Hague Regulations. It is true that Article 20 states in the authentic

⁶⁹ *Die Welt*, Aug. 5, 1949, p. 7.

⁷⁰ For this and the following two arguments see Laun, *op. cit.*, pp. 54 ff.

⁷¹ Quoted by Zinn, *Süddeutsche Juristen Zeitung*, 1947, p. 7.

French text: "*Après la conclusion de la paix, le rapatriement des prisonniers de la guerre s'effectuera dans le plus bref délai possible.*" But the Hague Regulations took into consideration only the regular situation, *i.e.*, the case where war was terminated by a treaty. For this regular case it was reasonable to retain prisoners of war until the peace treaty was concluded. Up to this moment hostilities could recommence. The exclusive purpose of the right to retain prisoners was to prevent them from taking part again in hostilities. This was also recognized in the judgment of the International Military Tribunal.⁷² But here hostilities came to an end years ago without any treaty, at the latest when the Japanese forces were disarmed, and cannot recommence. According to the principle laid down in Article 20, the German prisoners had to be released by that time at the latest.

Similarly, the conclusion has been drawn from the Geneva Convention of 1929 that prisoners must be sent home as soon as they can no longer be employed for fighting purposes.⁷³

The result of our deliberations is that the Hague Regulations are still applicable to Germany.

IV. HAS GERMANY REPRESENTATIVE ORGANS OF HER OWN IN THE INTERNATIONAL LAW SENSE?

States, as other legal persons, can act through their representative organs only. Representative organs in the international law sense are those persons establishing and maintaining intercourse between states and appointed thereto by the constitutions of the respective states.⁷⁴ When we assume that Germany continues to exist we consequently have to answer the next question whether Germany has at present representative organs which can act under international law, that is, whose acts can produce effects relevant to international law.

The Control Council is not a German, but an exclusively Allied representative organ. It was appointed by the occupants and consists of the Commanders-in-Chief of the Occupation Forces. It cannot be doubted that these commanders are exclusively subject to the orders of their governments. Thus the Report on the Tripartite Conference of Berlin of August 2, 1945, states in section III,A,1: "Supreme authority in Germany is exercised on instructions from their respective governments by the Commanders-in-Chief of the armed forces," while the governments of the four occupants declared in their statement on the control machinery in Germany of June 5, 1945, that "supreme authority in Germany will be exercised on instruction from their governments by the . . . Commanders-

⁷² According to Kaufmann, *op. cit.*, p. 77; accord: Resolutions, No. 8, 1947, *Jahrbuch*, Vol. I, 1948, p. 6.

⁷³ Geiler, *op. cit.*, p. 17.

⁷⁴ Verdross, *op. cit.*, p. 100; see also Liszt, *op. cit.*, p. 183.

in-Chief."⁷⁵ Actually each of the Commanders-in-Chief has only executed the orders of his government.

Some German authors attribute to the Control Council a dual position.⁷⁶ According to them the Control Council is a German as well as an Allied representative organ and as such has to act as a trustee, i.e., to represent German interests. It has, however, been shown above that the Allied Powers have no trusteeship title and that they do not feel bound to represent or defend German interests. Apart from this, such a dual position would bring about a grave collision of interests. As an Allied organ the Control Council would naturally have to consider Allied interests; as a German authority, German interests. They are in many, if not in most, cases contrary to each other. The dual position would simply mean that the Control Council in its capacity as a German authority could perform those acts not in accordance with the Hague Regulations.

If the Control Council had really a dual position, in spite of very clear statements on its subordination to orders of its respective governments only, then the German courts ought to be in a position to pass judgment on the validity of the laws passed by it in its German capacity, just as they can pass judgment on the validity of German laws. Such a power of review has, however, been rejected generally and without regard to whether the respective laws were passed in the interests of Germany or not. The basis thereof is the rule of international law that the courts of the occupied territory can pass judgment upon neither the validity of acts of the occupants nor their conformity with international law.⁷⁷ On the contrary, the German courts are not allowed to exercise jurisdiction when the existence, validity, terms, or effect of a Military Government order or law is in issue.⁷⁸

Yet it should not be forgotten that the occupants as well as the military governors have acted as true trustees in many respects. It is easy to understand that often efforts, especially those on the part of the Americans, have not met with the expected success, particularly because it is not easy to coördinate the divergent interests and plans of the Occupying Powers.

The Allied Military Governments are just as little German representative organs. This is confirmed by the fact that according to the opinion

⁷⁵ Off. Gaz. CCG, Supp. 1, pp. 14 and 10; see also the Statement on Consultation with the Governments of other United Nations, *ibid.*, p. 12.

⁷⁶ Grewe, *op. cit.*, p. 82; Rheinstein, *Michigan Law Review*, 1948, p. 27; Kaufmann, pp. 20, 28; von Mangoldt, *op. cit.*, p. 9; compare Budde, *Hamburger Allgemeine Zeitung*, Oct. 7, 1947; further references in Stödter, *op. cit.*, pp. 187, 189.

⁷⁷ E.g., OLG, Koblenz, *NJW*, 1949, p. 108; Koch, *ibid.*; Schack, *SJZ*, 1949, p. 697; OLG, Frankfurt/Main, *SJZ*, 1949, p. 759; Schätzel, *NJW*, 1948, p. 452. For further references see my remarks in *Deutsche Verwaltung*, 1949, p. 531, and Stödter, *op. cit.*, p. 214; see also Röhreke, *DEZ*, 1950, p. 35, and Dehler, *SJZ*, 1949, p. 212.

⁷⁸ Laws Nos. 13 and 28, and amendments of the Allied High Commission, *Official Gazette*, Allied High Commission, 1949/1950, pp. 54, 168, and 391.

of the military governors they are bound only by restrictions set up by themselves.⁷⁹

The same is true of the Allied High Commission set up by the "Agreement as to Tripartite Controls." The Commissioners are subordinated to their respective governments only. All governmental powers vested with the respective Allied Commanders-in-Chief are transferred to them. The exercise of the supreme authority is expressly retained by the three Allied Governments.⁸⁰

Germany still exists, but there are two German Republics not recognizing each other. Already this makes it appear dubious whether representatives of either of them could influence the international status or the rights and obligations of Germany. Thus the recognition of the Eastern boundaries by the *Deutsche Demokratische Republik* was declared null and void by the Federal Republic, while, *vice versa*, for instance, the participation of the Federal Republic in the Ruhr Authority was considered illegal by the *Deutsche Demokratische Republik*.⁸¹

The German *Länder* governments as well as the Federal Government cannot be representative organs under international law because they cannot represent Germany in her relations to other states. According to paragraph 2 (c) of the Occupation Statute this right is reserved to the High Commission. According to Art. VIII of the Charter of the Allied High Commission for Germany, even the right to receive foreign missions rests primarily with the High Commission.

Though the Eastern occupant has not issued a statute corresponding to the western "Occupation Statute" and reserving the same rights to the occupant, we may nevertheless assume that the same limitations are imposed upon the Government of the *Deutsche Demokratische Republik*.

The result of these considerations is that Germany, because she has no representative organs of her own, cannot yet act under international law, although she is a subject of international law. Because of this she has been called a dependent state.⁸²

⁷⁹ General Robertson and General Clay, *Neue Juristische Wochenschrift*, 1947, p. 204; critical: Zinn, *ibid.*, p. 9.

⁸⁰ Nos. 8 and 11 of the Agreement; Art. 1, par. 2, of the Charter of the Allied High Commission; preamble of the Occupation Statute (*VOBl.brit.Z.*, 1949, pp. 414, 406 and 400).

⁸¹ See Protest of the Bundestag, *HFP*, June 13, 1950; Grotewohl, *loc. cit.*, p. 8, and *DVB*, 2nd year, No. 2, p. 28.

⁸² Rheinstein, *loc. cit.*, p. 25; Czapski calls her a protectorate (*Neue Justiz*, 1948, p. 108).

THE COMPETENCE OF THE INTERNATIONAL LABOR ORGANIZATION UNDER THE UNITED NATIONS SYSTEM

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I. AIMS AND PURPOSES OF THE ILO

The International Labor Organization (hereafter referred to as the ILO)¹ was established by the peace treaties concluded at the close of World War I² as an autonomous part of the League of Nations for the purpose of promoting social justice.

1. *Under the Original Constitution*

The basic aims and purposes of the ILO are thus summed up in the preamble to the constitution and in Article 41 embodying the general principles: "Universal peace" which is the main objective of the League of Nations "can be established only if it is based upon social justice." "Conditions of labor" as they exist in many parts of the world and involving "such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled," require "an improvement of those conditions." The basic philosophy which should underlie social reforms is reflected in the statement contained in Article 41 that "labor should not be regarded merely as a commodity or article of commerce," and that the employed should be paid "a wage adequate to maintain a reasonable standard of life as this is understood in their time and country." To achieve the aims and purposes

¹ For general references on the ILO, see in particular: M. Guerreau, *L'Organisation Permanente du Travail* (Paris, 1923); International Labor Organization, *The First Decade* (London, 1931); E. Mahaim, "*L'Organisation Permanente du Travail*," in *Recueil des Cours de l'Academie de Droit International de La Haye* (Paris, 1924); P. Perigord, *The International Labor Organization* (New York, 1926); G. Scelle, *L'Organisation Internationale du Travail et le B.I.T.* (Paris, 1930); J. T. Shotwell (ed.), *The Origins of the International Labor Organization* (New York, 1934); F. G. Wilson, *Labor in the League System* (London, 1934).

² Versailles Treaty (Arts. 387-427), this JOURNAL, Supp., Vol. 13 (1919), p. 361; Treaty of St. Germain (Arts. 332-372); Treaty of Trianon (Arts. 315-355), this JOURNAL, Supp., Vol. 15 (1921), p. 135; and Treaty of Neuilly (Arts. 249-289). It has become customary to refer to the provisions of the various peace treaties dealing with the ILO as the constitution of the ILO and to give them a numeration independent from that in the peace treaties.

of the ILO international action is required, since "the failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve the conditions in their own countries." Uniformity of labor standards is, however, only the ultimate goal. Article 41 expressly provides that "differences of climate, habits, and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labor difficult of immediate attainment" and that, consequently, the general principles for regulating labor conditions should be applied by the industrial communities "so far as their special circumstances will permit." In the same spirit Article 19, paragraph 3, specifies that:

In framing any recommendation or draft convention of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different and shall suggest modifications, if any, which it considers may be required to meet the case of such countries.

And again, Article 35 pledges the members of the ILO to apply the conventions which they have ratified to their non-metropolitan territories "(1) Except where owing to the local conditions the convention is inapplicable, or (2) Subject to such modifications as may be necessary to adapt the convention to local conditions."

2. Under the Revised Constitution

With World War II approaching its end and with victory for the United Nations already in sight, the aims and purposes of the original constitution were redefined by the General Conference held in Philadelphia in 1944 in order to adapt them to the new realities and to the new aspirations aroused by the hopes for a better world. The instrument adopted to that effect has become known as the Philadelphia Declaration. On the occasion of the constitutional revision³ effected by the General Conference held in Montreal in 1946, the Philadelphia Declaration was annexed to the text of the revised constitution so as to form an integral part of it.

The Philadelphia Declaration did not change the basic philosophy of the original constitution. At the time of its adoption it was intended to be an all-inclusive document expressing the aims and purposes of the ILO. Accordingly, it restates most of the basic aims and purposes already set forth in the original constitution. Thus, it reemphasizes that "lasting peace can be established only if it is based on social justice" (II). This statement is amplified by another stressing that "poverty anywhere con-

³ See International Labor Conference, Twenty-Ninth Session, Montreal, 1946, Constitutional Questions, Parts 1, 2; C. W. Jenks, "The Revision of the Constitution of the ILO," in *British Year Book of International Law*, 1946, pp. 303 ff.

stitutes a danger to prosperity everywhere" (I, c) and that "the promotion of common welfare" ought to be sought by a relentless "war against want" (I, d). The basic approach to the labor problem is reflected in the restatement that "labor is not a commodity" (I, a). "All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity" (II, a). While emphasizing the universal scope of its principles, the Philadelphia Declaration, like the original constitution, does not conceive of labor standards as being necessarily uniform, but expressly provides that they "must be determined with due regard to the stage of social and economic development reached by each people," adding that "their progressive application to peoples who are still dependent, as well as those who have already achieved self-government, is a matter of concern to the whole civilized world" (V). The only major statement of the original constitution which is not repeated in the Philadelphia Declaration is the reference to international competition as a justification for international action in the field of social legislation. Whether this omission is accidental or intentional, it is difficult to guess. But it is of little importance in view of the fact that it continues to figure in the preamble to the constitution. To achieve these fundamental goals "effective international and national action" is necessary (IV).

Although already implied in the original constitution, the Philadelphia Declaration points to the close relationship between social and economic problems. It stresses in particular the necessity of "the fuller and broader utilization of the world's productive resources," of expanding production and consumption and of avoiding severe economic fluctuation. It stresses, too, the need of assuring "greater stability in world prices of primary products," of promoting "a high and steady volume of international trade," and of "the economic and social advancement of the less developed regions of the world" (IV). "All national and international policies and measures, in particular those of an economic and financial character, should be judged . . . and accepted only in so far as they may be held to promote and not to hinder the achievement" of the fundamental objectives of the Organization (II, c). While pledging "the full coöperation of the ILO with such international bodies as may be entrusted with a share of the responsibility" in the above-mentioned fields, as well as those "for the promotion of the health, education and well-being of all peoples" (IV), the Philadelphia Declaration claims for the ILO the responsibility "to examine and consider all international economic and financial policies and measures" (II, d) and to "include in its decisions and recommendations any provision which it considers appropriate" (II, e). These general aims and purposes of the Philadelphia Declaration are supplemented by an enumeration of specific reforms which, at variance with those included in

the original constitution, are couched in broader terms to cover present as well as future needs and aspirations.

The Philadelphia Declaration does not contain any provision to the effect that the aims and purposes, as outlined in it, are not to be considered as either complete or final. The lack of such an express reservation does not justify, however, an opposite conclusion. In fact, the Philadelphia Declaration intentionally uses such general language as to prevent any of its provisions from becoming obsolete, as was the case with some provisions of Article 41 of the original constitution, and to cover almost any conceivable new aspirations and needs.

3. *Legal Evaluation of the Aims and Purposes of the ILO*

Both the aims and purposes of the original constitution and, even more so, those of the Philadelphia Declaration have been couched in such general and vague terms that they cannot possibly have a directly binding effect. The aims and purposes expressed in the preamble to the constitution of the ILO simply indicate the motives by which the Contracting Parties were prompted in signing the instrument. The same is true of Article 41, now omitted from the text of the revised constitution, which refers to the general principles therein expressed as "methods and principles designed to guide the policy" of member states. Similarly, the Philadelphia Declaration speaks of the redefined aims and purposes as "principles which should inspire the policy" of member states of the ILO. In short, the aims and purposes expressed in the constitution of the ILO are in the nature of a proclamation of aspirations to serve as guides in the adoption of specific measures. Only if they have been specified in a convention or recommendation adopted by the General Conference and implemented by national legislation can they become binding domestically and subject internationally to the enforcement procedure provided for in the constitution. The only legal importance of the aims and purposes lies in the fact that it is from them that the competence of the ILO has to be determined.⁴

II. COMPETENCE OF THE ILO

1. *Aims and Purposes of the ILO as a Factor Determining Its Competence*

a. Under the original constitution

The original constitution of the ILO defines in Article 1 the competence of the Organization by reference to the aims and purposes as expressed in the preamble to the constitution. The article reads as follows: "A perma-

⁴ For an economic evaluation of the aims and purposes of the ILO, see H. Feis, "International Labor Legislation in the Light of Economic Theory," in *International Labor Review*, 1927; L. Chaudouard, *Le rôle de l'Organisation Internationale du Travail dans l'activité économique* (Paris, 1933).

nent organization is hereby established for the promotion of the objects set forth in the Preamble."

As a consequence of their incorporation into Article 1, the aims and purposes of the preamble, which otherwise would be of no direct legal consequence, have become a factor in determining the competence of the ILO. They are to be interpreted in the light of the general principles embodied in Article 41, even though this article has not been expressly referred to in Article 1 of the constitution.

The aims and purposes of the original constitution have been couched in such broad terms as to cover any conceivable reform in the social field. Were it not for the restrictive title "Labor," given in the peace treaties to the parts containing the labor clauses, and the title of the Organization itself, one would be tempted to attribute to the ILO a competence not only in the social field but also in the economic field, considering the fact that the social conditions are largely predetermined by economic conditions and under these circumstances do not lend themselves easily to a separate treatment. The ILO, however, did not go so far, even in the period of its greatest expansion, as to claim competence in economic matters. No autonomous organization for economic matters having been created by the peace treaties, these matters had to be dealt with by various sections of the League of Nations, which lacked the independent status of the ILO. In this situation, the ILO, with competence limited to social matters and no direct competence in economic matters, had to work in a kind of vacuum.

In spite of the language, which could have been hardly more comprehensive, the competence of the ILO did not go unchallenged. Some member states, believing in the antiquated concept of sovereignty, were reluctant to permit the ILO to establish international standards on matters which they considered as domestic. Thus, it was contended that the competence of the ILO did not extend to the regulation of the conditions of labor in agriculture, nor to the organization and development of the means of agricultural production, on the ground that agriculture was not an industry, and, moreover, was to be considered as a domestic matter exempt from the jurisdiction of the League of Nations. Similarly, on the occasion of the adoption of a convention prohibiting night work in bakeries, and containing, in this connection, provisions concerning the work of employers, these latter provisions were objected to as exceeding the powers given to the ILO. It was contended that the ILO could regulate only the labor of workers and under no circumstances the personal work of employers. The ILO constitution, in Article 37, provided that any question or dispute relating to its interpretation or to the interpretation of any subsequent convention concluded under its provisions, could be referred to the Permanent Court of International Justice for decision. Thus, the issues in dispute were referred to the Court for an advisory opinion. The Court, rejecting a

restrictive interpretation, declared itself in a number of advisory opinions⁵ in favor of an extensive competence of the ILO in social matters. Its findings may thus be summed up: The ILO may concern itself with conditions of labor in any field of economic activity, including agriculture. It may deal with labor problems, even though no consideration of international competition enters into the picture. While problems of the organization and development of production are outside the scope of the ILO, yet, in view of the inextricable interconnection between economic and social problems, the ILO may concern itself with these problems whenever they affect social conditions. To make effective the regulations concerning labor, the ILO may incidentally regulate also the personal work of employers. Finally, the Court refuted the argument that the extensive competence of the ILO may infringe upon the sovereignty of member states, by pointing to the fact that the ILO has no mandatory powers, and, this being so, it is left to the free discretion of the member states whether or not to implement a convention by national legislation.

With the unrestricted competence of the ILO in social matters thus firmly established, the ILO unfolded in the inter-war period a most intense activity. Scores of conventions and recommendations were adopted by the General Conference covering almost every field of labor.

b. Under the revised constitution

When the revision of the ILO constitution was effected by the Montreal Conference of 1946, the preamble to the constitution was slightly revised⁶ and Article 1 changed to take account of the incorporation into the constitution of the Philadelphia Declaration. Furthermore, Article 41 embodying the general principles was omitted from the text of the revised constitution as superfluous. All these changes are, however, of a purely formal character.

⁵ The Permanent Court of International Justice dealt with the problem of the competence of the ILO in the following advisory opinions: Nos. 2 and 3 concerning the Competence of the ILO in the Field of Agriculture; No. 13 concerning the Interpretation of the 1925 Convention on Night Work in Bakeries; and No. 50 concerning the Interpretation of the 1919 Convention on Night Work of Women. See Publications of the Court, Series B, Nos. 2, 3, 13 and Series A/B, No. 50. For a detailed analysis of these advisory opinions and of the competence of the ILO under the League of Nations system, see J. Chateau, *De la compétence de l'Organisation Internationale du Travail* (Paris, 1924); J. Morellet, "The Competence of the International Labour Organization," in *International Labour Review*, 1926; E. Hiitonen, *La compétence de l'Organisation Internationale du Travail* (Paris, 1929); C. W. Jenks, "La compétence de l'Organisation Internationale du Travail," in *Revue de Droit International et de la Législation Comparée*, 1927; G. Fischer, *Les rapports entre l'Organisation Internationale du Travail et la Cour Permanente de Justice Internationale* (Paris, 1946).

⁶ The preamble was enlarged by inclusion of "the principle of equal remuneration for work of equal value," which in somewhat different wording figured in Article 41, now omitted from the text of the revised constitution.

Article 1 defining the competence of the ILO now reads in its revised version as follows:

A permanent organization is hereby established for the promotion of the objects set forth in the Preamble to this Constitution and in the Declaration concerning the aims and purposes of the International Labor Organisation adopted at Philadelphia on 10 May 1944 the text of which is annexed to this Constitution.

The basic aims and purposes of the Philadelphia Declaration being substantially identical with those of the original constitution, the competence of the ILO, as determined on the basis of the constitution itself, remains the same as in the past.

2. The International Framework as a Factor in Determining the Competence of the ILO

The aims and purposes of the ILO are, however, far from being the sole factor determining its competence. Another factor of importance is the international framework within which the ILO is called upon to act.

a. The competence of the ILO under the League of Nations system

Under the League of Nations system, of which the ILO was an autonomous though closely connected part, the provisions of the League Covenant, which constituted a kind of over-all constitution for the whole system, had no significant impact on the competence of the ILO. The League of Nations was conceived as a body, the main function of which was to maintain peace. The importance of economic problems was not fully realized at the time of the drafting of the Covenant and no special machinery was provided for dealing with them, except for the establishment of the ILO, which was to promote social justice by action of its own. It is true that Article 23 of the Covenant provided that Members of the League among others

(a) will endeavour to secure and maintain fair and humane conditions of labor for men, women and children . . . and for that purpose will establish and maintain the necessary international organizations;

(b) undertake to secure just treatment of the native inhabitants of territories under their control;

However, the reservation placed at the beginning of Article 23, "Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon," as well as the reference to the establishment of "the necessary international organizations," leaves no doubt that the League was determined to leave those matters entirely to the international organizations established for that purpose, and in particular to the ILO, which, although not mentioned by name in the Covenant, was provided for in the peace treaties simultaneously with the League of Na-

tions. Nor can Article 24 of the Covenant which stipulates that "all international bureaux already established by general treaties if the parties to such treaties consent," as well as the provision that "All such international bureaux and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League," be interpreted as establishing a concurrent League competence with those international bureaux and commissions. Only gradually did the League of Nations evolve a machinery for dealing with urgent economic problems by the creation of technical organizations under the authority of the Council. These organizations included the Economic and Financial Organization, the Communications and Transit Organization, the Health Organization and the Intellectual Coöperation Organization. These were supplemented by a number of League commissions, including the Economic and Financial Commission, the Committee of Statistical Experts, the Demographic Commission, the Delegation on Economic Depressions, the Permanent Mandate Commission, and others. In order to establish close co-operation between these various standing committees, the Report of the Special Committee (the so-called Bruce Committee on the Development of International Coöperation in Economic and Social Affairs) proposed, shortly before the outbreak of the second World War, the creation of a new organ to be known as the Central Committee for Economic and Social Questions. That Committee may be considered the prototype of the Economic and Social Council under the United Nations. However, the autonomy of the ILO, due in part to the dynamic personality of its first Director and to the high level of its personnel, was by that time so firmly established that all this network of existing or contemplated League machinery did not affect in any way the competence of the ILO.

b. The competence of the ILO under the United Nations system

Under the United Nations system⁷ the situation underwent radical changes. In the drafting of the United Nations Charter the importance of social and economic problems to the general welfare and friendly rela-

⁷ H. Finer, *The United Nations Economic and Social Council* (Boston, 1946); C. Goodrich, *The International Labor Organization and the United Nations* (New York, 1944, mimeographed); A. G. B. Fisher, "International Economic Collaboration and the Economic and Social Council," in *International Affairs* (London, 1945), pp. 459 ff.; *idem*, "The Future of International Institutions," in *Yearbook of World Affairs* (London, 1947), pp. 178 ff.; W. R. Sharp, "The Specialized Agencies and the United Nations—Progress Report," in *International Organization* (1947), pp. 460 ff. (1948), pp. 247 ff.; Carnegie Endowment for International Peace, *United Nations Studies*, No. 2: *Coördination of Economic and Social Activities* (New York, 1948); H. McNeil, "Accomplishments in the Economic and Social Fields," in *International Conciliation* (1948), pp. 633 ff.; L. M. Goodrich and E. Hambro, *Charter of the United Nations* (2nd ed., Boston, 1949), pp. 318–405; H. Kelsen, *The Law of the United Nations* (New York, 1950), pp. 22 ff., 98 ff. Kelsen's book appeared after this article was already in type.

tions among nations was fully realized. Accordingly, the aims expressed in the preamble to the Charter stress the determination "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women"; "to promote social progress and better standards of life in larger freedom," "and for these ends . . . to employ international machinery for the promotion of the economic and social advancement of all peoples." Even more important than these high-sounding general aims of the preamble, which as such would have no direct legal value, are the specific purposes defined in the formal provisions of the Charter itself. Thus, Article 1 indicates as one of the purposes of the Organization:

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

Chapter IX on International Economic and Social Coöperation uses even more specific language, pointing out in Article 55 that:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Similar repetitious pronouncements are to be found in Chapter XI, containing the Declaration Regarding Non-Self-Governing Territories, in Chapter XII concerning the International Trusteeship System, and in the provisions defining the powers of the various organs of the United Nations.

While establishing the competence of the United Nations in such broad terms the Charter pledges in Article 56 all Members "to take joint and separate action in coöperation with the Organization for the achievement" of these purposes. It provides in Article 57 in particular that "The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations. . . ." It further provides in Article 59 that the United Nations "shall, where appropriate, initiate negotiations among the states concerned for the creation

of any new specialized agencies" for the accomplishment of its purposes. And finally in Article 58 it states that "The Organization shall make recommendations for the coördination of the policies and activities of the specialized agencies."

The responsibility for the achievement of the purposes of United Nations in the field of general welfare is vested in the Organization as a whole.

Although the Security Council in which rests the center of gravity of the United Nations, has not been assigned a specific responsibility in the field of general welfare, it is clear that those matters are of concern to it in view of the fact that international disputes, which it is called upon to settle, may have social and economic backgrounds. Its concern in this field is confirmed by the provision of Article 65, which pledges the Economic and Social Council to "assist the Security Council upon its request."

The main responsibility for the discharge of the functions of the United Nations in the field of general welfare rests with the General Assembly. It initiates studies and makes recommendations "for the purpose of . . . promoting international coöperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (Article 13, par. 1 b). It "may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations" (Article 14). It approves agreements negotiated with specialized agencies by which they are brought into relationship with the United Nations (Article 63, par. 1). It considers and approves "financial and budgetary arrangements with specialized agencies" and examines "the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned" (Article 17, par. 3).

As the General Assembly is too large a body to discharge all the responsibilities assigned to it, the Economic and Social Council has been called into being for the discharge, under its authority, of further functions. The Council, a body of eighteen members elected by the General Assembly, is assisted in its work by a number of commissions and subcommissions. In addition to the commissions in the economic and social fields, and for the promotion of human rights, the establishment of which was made mandatory in Article 68 of the Charter, a number of other commissions, functional and regional, and subcommissions have been created.⁸ In discharging

⁸ There are at present the following functional and regional commissions and subcommissions: Economic and Employment, with Subcommissions on Employment and Economic Stability; Transport and Communications; Fiscal; Population; Social; Statistical, with a Subcommission on Statistical Sampling; Narcotic Drugs; Human Rights, with Subcommissions on Freedom of Information and Prevention of Discrimination and Protection of Minorities; Status of Women; Economic Commission for Europe, with Inland Transportation Committee and Coal Committee; Economic Commission for

its functions, the Council may make use of a wide array of devices which have been developed in international practice up to date and some of which coincide with those already mentioned in describing the powers of the General Assembly. The Council "may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations and to the specialized agencies concerned" (Article 62, par. 1); "it may prepare draft conventions for submission to the General Assembly with respect to matters falling within its competence" (Article 62, par. 3); "it may call . . . international conferences on matters falling within its [the United Nations'] competence" (Article 62, par. 4); it "shall perform such functions as fall within its competence in connection with the carrying out of the recommendations of the General Assembly"; "it may, with the approval of the General Assembly, perform services at the request of Members of the United Nations and at the request of specialized agencies," and "it shall perform such other functions as are specified in the . . . Charter or as may be assigned to it by the General Assembly" (Article 66). One of the many functions of the Council is the coördination of the activities of "the various specialized agencies established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields," by bringing them into relationship with the United Nations on terms to be defined in agreements to be concluded with specialized agencies, subject to the approval of the General Assembly (Articles 57, 63, par. 1); "through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations" (Article 63, par. 2); through requesting "regular reports from the specialized agencies," and "reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly," and communicating "its observations on these reports to the General Assembly" (Article 64).

As may be seen from the above analysis, the powers assigned by the Charter to the United Nations in the field of general welfare, including social, economic, cultural, educational, health and other related matters, are sweepingly broad and can be exercised by practically every conceivable means. The coördination of the activities of the existing specialized agencies, important as it certainly is, is only one among the many other applicable devices. Thus, the United Nations may, if it sees fit, prepare a draft

Asia and the Far East; Economic Commission for Latin America; Economic Commission for the Middle East (proposed). The activities of most of these commissions and sub-commissions overlap with the activities of the ILO and of other specialized agencies of which there are at present ten altogether, with three others being proposed.

convention and submit it to an international conference convened *ad hoc*, even though the matter falls within the competence of a specialized agency. In line with the adopted structure of the United Nations, based as it is on the recognition of the sovereignty of the Member States, the powers assigned to the United Nations, similarly as those of other international organizations with specialized responsibilities, are not mandatory, and the Member States remain free to implement the decisions of the United Nations. Neither are the recommendations made by the United Nations to specialized agencies binding upon them unless they are within the limits of the terms of the agreements by which they have been brought into relationship with the United Nations. Be that as it may, it is important to emphasize, insofar as the subject-matter of this paper is concerned, that the powers vested in the United Nations in the field of general welfare amount to establishing a competence which concurs with the competence assigned to other international organizations with specialized responsibilities by their basic instruments.

III. CONFLICTS OF COMPETENCE

Concurrent competence is by no means a new phenomenon. It may take a number of forms. The solution of competence conflicts varies with their type.

1. *Competence Conflicts between Various Organs of an International Organization*

One form of competence conflict may result from the fact that various organs of an international organization have been given concurrent competence. Thus, under the League of Nations, the Council and Assembly had a concurrent competence to deal "with any matter within the sphere of action of the League or affecting the peace of the world" (Article 3, par. 3, Article 4, par. 4, of the League Covenant). Similarly, under the United Nations, the competence of the General Assembly, which nominally is the supreme organ of the Organization, and that of the various Councils are in many ways concurrent. This is, however, true only with many important qualifications. Insofar as the relationship of the General Assembly and the Security Council is concerned, the General Assembly "may discuss any questions relating to the maintenance of international peace and security brought before it," but "any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion" (Article 11, par. 2). And again: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests" (Article 12, par. 1). As a consequence, the Security Council is put in a position of actual

supremacy over the General Assembly. On the other hand, the Economic and Social Council, as well as the Trusteeship Council, which have been assigned a competence which in many respects is concurrent with that of the General Assembly, act under the latter's authority (Articles 60, 85, par. 2). This assures the General Assembly supremacy over both these Councils in any possible conflict as to competence.

2. Competence Conflicts between Various International Organizations

Another form of concurrent competence is due to arise when the basic instruments of distinct international organizations establish a concurrent or overlapping competence. It is in this class that the concurrent competence of the United Nations and that of the ILO and of other international specialized organizations belongs. The solution of the conflicts which may result in this connection depends on the status of the international organizations concerned, or, to be more specific, on whether the organizations have an equal status or whether one is superimposed over the other.

a. Competence conflicts between international organizations where one is superimposed over another

It is in this class that competence conflicts belong which arise between the United Nations and the ILO and other international specialized organizations. The relevant point in appraising their mutual relationship is the fact that the United Nations is superimposed over all other international organizations in which its Members participate. This is evidenced by Article 103 of the Charter which stipulates that:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 103 follows the pattern set forth in Article 20 of the Covenant of the League of Nations. There is, however, a profound difference between these two provisions. Relying on legal principles heretofore adhered to, Article 20 of the League Covenant makes, in the first place, a distinction between the original Members of the League and those joining it at a later date. The original Members of the League abrogated, by means of a common declaration inserted to that effect in Article 20 of the Covenant, "all obligations or understandings *inter se* which are inconsistent with the terms" of the Covenant, and at the same time solemnly undertook "that they will not hereafter enter into any engagements inconsistent with the terms thereof." As for the states becoming Members of the League at a later date, and having before that date "undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such

obligations." The provision dealing with the states becoming Members of the League at a later date leaves open the question whether they are bound to obtain the release from their obligations before becoming Members of the League of Nations and what should happen if the steps undertaken by them to that effect remained unsuccessful. Far less legalistic in its approach to the problem, Article 103 of the United Nations Charter covers by one uniform provision all possible situations. It declares that, in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail, and this irrespective of whether they have been entered into before or after the state became a Member of the United Nations and whether the other state involved is or is not a Member of the United Nations. The solution adopted by Article 103 of the Charter reflects an entirely different approach to the problem under discussion. It conceives of the Charter as an overall constitution⁹ which prevails, at least insofar as the Members of the United Nations are concerned,¹⁰ over any other international agreement. The situation is somewhat similar to that obtaining in federal states in which even a more radical solution prevails, *i.e.*, that the provisions of the federal constitution invalidate the conflicting provisions of the constitutions of the component states. However, this analogy should not be pushed too far. After all, the United Nations is neither a super-state nor a federal union, but rather a loose association of sovereign states. Moreover, due to the principle of voluntary membership in international organizations, and the resulting lack of their universality, membership in the United Nations and in the ILO and other specialized agencies does not necessarily coincide. Under these conditions the rule of the primacy of the United Nations Charter can be applied only to those Members of the United Nations which at the same time are members of other international organizations, leaving outside of its scope of action members of international organizations with no membership in the United Nations. Thus, the lack of universality in the membership of international organizations brings into light the different status of their members, depending on whether they are or are not Members of the United Nations. In actual practice differences in the legal status of the members of international organizations should not prove too embarrassing, since membership in the United Nations and in other international organizations coincides for the most part.

It may be argued that the provision under discussion has no bearing whatsoever on the problem of the concurrent competence of the United Nations and that of the ILO or any other specialized international organization on the ground that the provisions defining their competence do not

⁹ L. M. Goodrich and E. Hambro, *op. cit.*, pp. 517 ff.

¹⁰ For Kelsen's interpretation of Art. 103 of the Charter, see his work cited *supra*, note 7, pp. 111 ff.

create "obligations" for the Contracting Parties. However, such a restrictive literal interpretation would be contrary to the spirit of the provision. This provision actually lays down the rule of primacy of the United Nations Charter over other international instruments to which the Members of the United Nations are parties. In other words, the United Nations Charter was intended to be an over-all constitution for the whole international set-up as it exists at present. It was to have a definite priority over the constitution of the ILO, as well as those of other specialized international organizations, irrespective of the time of their enactment and their coming into force, and irrespective of whether or not they have been brought into formal relationship with the United Nations. This does not mean that the provisions in the basic instruments of the specialized international organizations which conflict with those of the United Nations Charter have lost their validity and have been automatically abrogated. The wording of Article 103 of the Charter is clear in this respect. It states that its provisions shall, in case of actual conflict, "prevail" over the conflicting provisions in the basic instruments of other international organizations. Accordingly, whenever the United Nations decides to make use of the powers granted to it by the provisions of the Charter, these powers shall be recognized by the Members of the United Nations as having precedence over the concurrent powers of any other international organization in which they participate. Applied to the problem of competence, the rule means that the United Nations, which has been given practically unlimited power to deal with social and economic matters, may, if it so wishes, take up any matter irrespective of the fact that it falls within the competence of the ILO or any other specialized international organization.

Such is the situation in strict law. Although legally the United Nations can claim competence in any matter falling within the scope of general welfare, in actual practice it is unlikely that it would take a course of action which would be clearly unreasonable and which would not take cognizance of the existence of international organizations which had been called into being to perform specific functions. In addition to the ILO, established in the peace treaties following the first World War, other specialized international organizations have been created in the period following the second World War and their number is constantly increasing. Invoking competence by the United Nations in matters falling within the competence of these specialized international organizations would duplicate their activities and create chaos. It would be contrary to one of the purposes of the United Nations expressed in Article 1, par. 4 of the Charter, whereby the United Nations has to serve as "a center for harmonizing the actions of nations in the attainment of . . . common goals." It would likewise be contrary to the supplementing provision of Article 57, according to which the various international organizations with specialized responsibilities in economic, social, cultural, educational, health and re-

lated fields shall be brought into relationship with the United Nations for the purpose of coördinating their activities. In this situation, it is reasonable to assume that the United Nations will limit itself to coördinating the activities of the various specialized agencies, each of which is vested with a special function and all of which together constitute an organic whole.

Moreover, it should not be forgotten that membership in the United Nations and in the specialized international organizations, although not identical, coincides to a considerable extent. This being so, the states with membership in the United Nations and in the specialized international organizations will be reluctant to allow the United Nations to deal with a matter which, even though it falls within its broadly defined competence, can be more expertly dealt with by a functional organization expressly established for that specific purpose. A different approach to this problem is conceivable only on the part of those Members of the United Nations which, as is the case of the Soviet Union, are members of only a few of the other international organizations. Such a situation is contrary to the spirit of the United Nations Charter which envisaged universal participation by the Members of the United Nations in the subsidiary functional organizations. It is clearly exceptional, and since such Members are in the minority, it may be safely assumed that they will not be able to influence the decisions of the Economic and Social Council or of the General Assembly, in which the veto power does not operate. Under these circumstances, it is to be surmised that, as a general rule, an organization with specialized responsibilities will be allowed to deal with any matter which clearly falls within its competence. If the United Nations were to pursue a policy of encroaching upon the competence of the several organizations with specialized responsibilities, it would, instead of acting as a center of harmonizing their activities, become a disorganizing factor. Only exceptionally could a different approach be justified, as in the case when a matter is considered to be of such paramount importance as to be properly dealt with by the United Nations itself, or when a certain matter falls within the scope of action of several specialized international organizations. The Declaration on Human Rights, adopted by the United Nations, is a case in point.

b. Agreement of December 14, 1946, concluded between the United Nations and the ILO

In addition to the provisions of the United Nations Charter itself, certain facts subsequent to the establishment of the United Nations are to be considered in determining the competence of the United Nations and of the ILO.

Long before the establishment of the United Nations, the ILO declared its readiness to coöperate with the international organizations which might

be created at the conclusion of the second World War. As far back as in 1944, the Philadelphia Declaration pledged "the full coöperation of the ILO with such international bodies, as may be entrusted with a share of responsibility" in economic, social, health, education and other matters concerning the well-being of all peoples. Subsequently, the Paris Conference of 1945, held after the entry into force of the United Nations Charter, pledged, in a resolution adopted to that effect,¹¹ the full coöperation of the ILO with the United Nations. The Conference confirmed its desire to enter into relationship with the United Nations on terms to be determined by agreement, which would permit the ILO to coöperate fully for the ends expressed in the Charter, "while retaining the authority essential for the discharge of its responsibilities under the Constitution of the Organization and the Philadelphia Declaration." Finally, on the occasion of the revision of the ILO constitution, effected at the Montreal Conference in 1946, a new provision was inserted in Article 12 stipulating that "the ILO shall coöperate within the terms of [its] Constitution with any general international organization entrusted with the coördination of the activities of public international organizations having specialized responsibilities." The formula used by this provision, although not mentioning the United Nations by name, clearly refers to it, since it is precisely the United Nations which has been entrusted with the task of coördinating the activities of specialized international organizations. The pledge contained in Article 12 extends not only to the United Nations but also to other international organizations with specialized responsibilities. Article 12 provides furthermore for making "appropriate arrangements for the representatives of public international organizations to participate without vote in its deliberations."

On the other hand, Articles 57 and 63 of the United Nations Charter provide, as already mentioned, that international organizations having wide responsibilities in economic, social, cultural, educational, health and related fields should be brought into relationship with the United Nations through agreements negotiated with these organizations by the Economic and Social Council, subject to the approval of the General Assembly. Such organizations actually brought into relationship with the United Nations are referred to in the Charter as "specialized agencies" *sensu stricto*.

It is on the basis of the provisions contained in the United Nations Charter and in the constitution of the ILO that an agreement, dated May 30, 1946, was negotiated between the two organizations and subsequently approved by the General Assembly of the United Nations and the General Conference of the ILO. It came into force on December 14, 1946, the ILO thus becoming the first specialized agency within the United Nations

¹¹ International Labour Conference, Twenty-Ninth Session, Constitutional Questions, Part 1, Montreal, 1946, p. 30.

system. The agreement has served as a model for negotiating similar agreements with other specialized international organizations.¹²

Although the Agreement of December 14, 1946, between the United Nations and the ILO formally treats the two organizations as if they had equal international standing, these outward appearances should not blind us to the fact that the ILO has lost much of its independence which it had heretofore. Even though, under the League of Nations system, the ILO was closely tied to the League, which performed various functions for it, actually the ILO came to occupy such an independent position that it was generally accepted as one of the parts of the system consisting of the League itself, the ILO and the Permanent Court of International Justice. In spite of that fact, and even though most of the functions heretofore performed by the League of Nations were transferred to it, the ILO with its integration into the United Nations system has been relegated to the rank of one of the many specialized agencies subordinate to the United Nations. The ILO, as well as the other specialized agencies, have to submit regular reports on their activities and on the steps taken to give effect to the recommendations made by the Economic and Social Council or the General Assembly. The Council may communicate its observations on these reports to the General Assembly, which in turn may make further recommendations. The specialized agencies will thus be kept under constant pressure to follow the lead of the United Nations.

However, it is important to point out that, insofar as the problem of competence is concerned, the agreement concluded between the United Nations and the ILO contains a provision in Article I whereby "the United Nations recognizes the ILO as a specialized agency responsible for taking such action as may be appropriate under its basic instrument for the accomplishment of the purposes set forth therein." This provision constitutes implied recognition by the United Nations of the competence of the ILO as defined in its constitution, which amounts to a renunciation by the United Nations of its concurrent competence to the same extent.¹³ In addition to the arguments already referred to, the provision in question supplies a further legal argument that the United Nations is bound to respect the competence of the ILO as laid down in its constitution.

¹² J. H. E. Fried, "Relations between the United Nations and the ILO," in *American Political Science Review*, 1946.

¹³ The question may be asked whether this provision, inserted in a kind of an executive agreement concluded between the U.N. and the ILO, is binding upon their membership. It is conceivable that Members of the U.N., and particularly those Members of the U.N. which are not at the same time members of the ILO, may dispute the validity of the renunciation of U.N. competence in matters which have been assigned to it by the Charter in favor of the ILO (or any other specialized agency). Since such Members of the U.N. which are not at the same time members of the ILO are in the minority, however, they are not likely to succeed in invalidating the relative provision of the agreement by a decision taken to that effect by the U.N. Neither is it likely

The validity of this argument is, however, considerably weakened by the reservation included in Article IX of the agreement under discussion. This article, while granting to the ILO, in accordance with Article 96 of the United Nations Charter, the general authorization of the General Assembly to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities, expressly exempts from this authorization "questions concerning the mutual relationships of the Organization [the ILO] and the United Nations or other specialized agencies." As a consequence, the ILO is prevented from bringing before the Court any issue to determine its competence with regard to the United Nations and other specialized agencies. This does not mean that the Court cannot under any circumstances pronounce itself on the issue of the competence of the ILO. The General Assembly, under Article 96 of the United Nations Charter, always has the right to request the Court to give an advisory opinion on any legal question. Furthermore, according to an authorization given by the General Assembly to the Economic and Social Council on December 11, 1946, the latter may request advisory opinions on all legal questions within the scope of its activities, including legal questions concerning mutual relationships between the United Nations and the specialized agencies. This formula covers the issue of delineating the competence of the ILO with regard to the United Nations as well as to the other specialized agencies. It remains, however, to be seen whether the General Assembly or the Economic and Social Council, aware of their supremacy established by the Charter, will be inclined to refer the delicate issue of their competence and that of the ILO and other specialized agencies to the Court for an advisory opinion, and, assuming that such an opinion has been rendered, whether they will be willing to conform to it. This will ultimately depend on whether the states which are at the same time Members of the United Nations and of the ILO or other specialized agencies will throw their influence behind the former or the latter.

3. Competence Conflicts between the Specialized International Organizations

Thus far we have been concerned with competence conflicts arising between the United Nations and the ILO and other specialized agencies. The picture would be incomplete without mentioning the possibility of competence conflicts which may arise between the ILO and the other specialized international organizations.

Although each international organization has been called into being for the performance of distinct and specific functions, competence con-

that such a dispute will be submitted for an advisory opinion of the International Court of Justice.

licts are unavoidable whenever their functions are related or overlapping. Competence conflicts between the specialized international organizations are by no means a recent phenomenon. As far as the ILO is concerned, such potential conflict existed in the inter-war period with regard to the International Institute of Agriculture in Rome. To coördinate the activities of these institutions a Consultative Mixed Committee was established. However, in the post-war period the problem assumed increased importance with the number of specialized international organizations steadily growing. For example, the Food and Agriculture Organization (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the World Health Organization (WHO) deal partially with problems which are either within the scope of the ILO or are of direct concern to it. Any attempt to solve possible competence conflicts on the basis of general legal abstract principles would encounter the greatest difficulties. It would hardly be compatible with the incontestable intention of the Contracting Parties that the various functional organizations be treated on equal footing, to attach a decisive importance to the respective dates of their establishment, on the theory that obligations contracted at a later date have to be interpreted in such a way as not to conflict with those contracted at an earlier date. Such reasoning, moreover, would not take into account the fact that the membership in the various organizations is not identical. Practically speaking, the only satisfactory solution of possible competence conflicts is by agreement between the organizations concerned.

This solution is implied in the pledge of coöperation contained in Article 12 of the revised constitution of the ILO. That pledge includes not only any general international organization entrusted with the coördination of the activities of public specialized international organizations (a formula which embraces the United Nations), but also the specialized organizations themselves in their mutual relationships. The bases of such coöperation may be laid down in an agreement concluded between the individual functional organizations. The conclusion of such agreements remains possible even after they have been brought into relationship with the United Nations. The admissibility of such agreements results from Article XVI of the Agreement concluded between the United Nations and the ILO.¹⁴ Under the heading "Inter-Agency Agreements," the Agreement expressly sanctions their future use, but with the proviso that the ILO must inform

¹⁴ Such agreements have been concluded by the ILO with the FAO, UNESCO, and WHO. A conclusion of similar agreements is contemplated with the ITO and the IMCO, when they are finally established. See First Report of the ILO to the United Nations, Vol. II, p. 393; Second Report, pp. 131, 135; Third Report, pp. 183, 188. All these agreements contain a stereotype provision for close coöperation and consultation in regard to matters of common interest, for reciprocal representation and establishment of joint commissions, but do not deal expressly with the problem of solving competence conflicts.

the Economic and Social Council, before the conclusion of an inter-agency agreement, of its nature and scope, obviously for the purpose of giving the Council an opportunity to formulate recommendations if deemed necessary.

However, in the case of the ILO and the many other functional organizations brought into relationship with the United Nations, the most important means of solving possible competence conflicts is through recommendations to that effect adopted by the General Assembly or the Economic and Social Council in the discharge of their responsibility to coördinate their activities. Although the recommendations are not directly binding upon the specialized agencies, actually it is unlikely that they would remain unheeded. In most instances, the competence conflicts may be resolved without ever being brought to the attention of the General Assembly or the Economic and Social Council. In this connection mention should be made of the Coördination Committee established by a resolution of the Economic and Social Council for the purpose of discussing problems of common concern and ironing out differences of opinion. This committee, composed of the Secretary General of the United Nations and the executive heads of the specialized agencies, may be helpful in eliminating conflicts of competence.

IV. JURISDICTION OF THE WORLD COURT IN DETERMINING THE COMPETENCE OF THE ILO

Considering the machinery which has been evolved to solve conflicts of competence which may arise between the ILO and other international organizations, the World Court is not likely to assume the same rôle it had played in the past in determining the competence of the ILO.

1. *Legal Bases of Jurisdiction*

The legal bases for the jurisdiction of the World Court in cases involving the competence of the ILO are to be found partly in the ILO constitution itself, and partly in other provisions.

a. Provisions of the ILO constitution pertaining to the jurisdiction of the World Court

The pertinent provision of the ILO constitution is contained in Article 37, which stipulates that:

Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the Permanent Court of International Justice. . . .

In the revised constitution, this provision remained unchanged except for the substitution of "International Court of Justice" for "Permanent Court of International Justice."

This provision was subject from the outset to divergent interpretations due to its ambiguous wording and the discrepancies between the English and French texts, both of which are equally authentic.¹⁵ It does not answer, in particular, the question whether it refers to decisions rendered by the Court in a contentious procedure which are binding between the parties concerned, or to advisory opinions, or to both decisions and advisory opinions. Neither does it decide the issue who should have access to the Court: the ILO, as such, or its individual members, or both. As the literal interpretation of the provision does not permit a determination of its scope, it becomes important to consider the intention of the authors. This intention seems to have been to give both the ILO and its individual members direct access to the Court by all available means; that is to say, by referring a contentious case for a decision of the Court, or by requesting its advisory opinion in cases of doubt as to the legal situation. However, such an extensive interpretation of Article 37 of the ILO constitution would be clearly incompatible with other pertinent provisions in other international instruments.

b. Jurisdiction of the World Court under the League of Nations system

Under the League of Nations system,¹⁶ Article 37 of the ILO constitution had to be interpreted in conjunction with the provisions of the Covenant of the League of Nations, these provisions having, according to Article 20, precedence over those in other international instruments. Article 14 of the Covenant, in providing for the establishment of the Permanent Court of International Justice, stipulated that the Court, in addition to deciding disputes, may also give advisory opinions upon any dispute or question referred to it by the Council or the Assembly of the League of Nations. This provision, assuming its precedence over that of Article 37 of the ILO constitution, precluded, insofar as advisory opinions were concerned, a direct approach to the Court by either the ILO or its individual members. Both had to go through the Council or the Assembly. But it did not affect the right to submit disputes to the Court for a decision. Another pertinent provision to be taken into account in interpreting Article 37 of the ILO constitution was to be found in Article 34 of the Statute of the Permanent Court of International Justice. This article

¹⁵ Thus, the terms in the English text "any question or dispute" are identical with those used in Art. 14 of the Covenant of the League of Nations with reference to advisory opinions, and would imply that the article under discussion had advisory opinions in mind. On the other hand, the term "shall be referred for a decision" would indicate a decision of the Court rendered in a contentious procedure, and not an advisory opinion. This latter conclusion, however, is not corroborated by the term "*appréciation*" used in the French text as equivalent to "decision" in the English text, which would point rather to an advisory opinion and not to a decision or judgment.

¹⁶ M. O. Hudson, *The Permanent Court of International Justice* (New York, 1934); G. Fischer, *op. cit.*

stipulated that only states may be parties in a dispute on which the Court renders a judgment, thus barring the ILO as such from seeking a decision of the Court.

In the light of all the pertinent provisions, the legal situation may be summed up as follows: Only states could refer a dispute to the Court and the decision was then binding upon the parties in dispute with regard to the particular case decided by the Court. For advisory opinions, both the ILO and its individual members could approach the Court, but only through the Council or the Assembly with which rested the ultimate decision as to whether such an advisory opinion should be requested. Actual practice conformed with this legal situation, except that it was always the Council and not the Assembly which requested advisory opinions of the Court. Despite its claim that it was entitled to approach the Court, directly, the ILO had to go for advisory opinions through the Council. The same was true of the members of the ILO which sometimes submitted the request for an advisory opinion directly to the Council without previously consulting the ILO.

c. Jurisdiction of the World Court under the United Nations system

Under the United Nations system¹⁷ the legal situation is substantially the same as under the League of Nations set-up. According to Article 103 of the United Nations Charter, the Charter and the Statute of the International Court of Justice which is an integral part of the Charter, take precedence over the provisions in other international instruments, including those in the ILO constitution. The Charter does not affect in any way the validity of the clause contained in Article 37 of the ILO constitution which provides that any dispute which may arise in the future concerning the interpretation of the constitution or of a convention concluded on its basis should be submitted to the Court for a decision. The validity of that clause has been expressly recognized in Article 36 (1) of the Court Statute, which stipulates that the jurisdiction of the Court includes all cases provided for in treaties and conventions in force. As for advisory opinions, Article 96 of the Charter and Article 65 of the Statute lay down the rule that only the General Assembly or the Security Council has the primary right to request advisory opinions of the Court on legal questions. Other organs of the United Nations, and, in particular, the specialized agencies, may request advisory opinions of the Court only if so authorized by the General Assembly.

In pursuance of this provision, the General Assembly authorized the ILO, in Article IX of the Agreement of December 14, 1946, "to request advisory opinions of the International Court of Justice on legal questions

¹⁷ C. W. Jenks, "The Status of International Organizations in Relation to the International Court of Justice," in *Transactions of the Grotius Society*, 1947.

arising within the scope of its activities." Compared with the legal situation prevailing under the League of Nations, when the ILO had to go through the League Council in each particular instance, the authorization given to the ILO by the United Nations facilitates its access to the Court by enabling it to approach the Court directly. It is to be assumed that individual members of the ILO may not go over the head of the ILO and ask the General Assembly or the Security Council, with whom rests the primary right to request advisory opinions, that such an opinion be requested in a particular case. Such a practice, which under the League of Nations was vigorously opposed by the ILO, would be incompatible with the purpose of the authorization, which was to leave with the ILO the decision whether or not an advisory opinion should be requested in a given instance and, if so, on which questions. As already pointed out, the authorization granted the ILO does not extend to "the mutual relationships between the Organization and the United Nations and other specialized agencies." This restriction is of particular importance, since it prevents the ILO from requesting advisory opinions in the field in which most of the possible competence conflicts are likely to occur. It does not preclude an advisory opinion altogether, but reserves to the General Assembly the right to request an opinion. Furthermore, the Economic and Social Council may, on the basis of the authorization given to it by the General Assembly on December 14, 1946, request advisory opinions on all legal questions within the scope of its activities, including its relationships with the ILO and the other specialized agencies.

2. The Jurisdiction of the World Court in Actual Practice

As may be seen from the above analysis, the issue of the competence of the ILO may theoretically be referred to the Court in one of two ways. In the first place, states involved in a dispute over the competence of the ILO may, on the basis of Article 37 of the ILO constitution, submit a dispute to the Court for a decision. No such decision has ever been requested in the past, nor is it likely to be requested in the future. The reason for this is clear. The constitution of the ILO and the conventions enacted on its basis are multilateral treaties, and, as such, should be interpreted in a uniform way with regard to all member states. A decision rendered by the Court in a dispute between two or more states would not serve this purpose, for its decision would have a binding force only between the parties concerned (Article 59 of the Court Statute) and, at best, those other member states of the ILO which had intervened in accordance with Article 63 of the Statute. Since intervention is left to the discretion of each member state, the decision of the Court, apart from the improbable case that all member states intervened, would not be binding upon all of them, as is clearly desirable in the case of a multilateral treaty. Under

these circumstances, the advisory opinion remains the only feasible means by which the Court may pronounce itself on the issue of the competence of the ILO. Since advisory opinions may be requested only by an international organization, whether it be the United Nations or, within the limits of the authorization granted, the ILO, and not by its individual members, the Court in rendering its opinion may take into account the implications of the issue with regard to the Organization as whole as well as to all its members bound between themselves by a multilateral treaty. In contrast to a decision, which has binding force, albeit only between the parties involved in a dispute, the advisory opinion has no binding force.¹⁸ Actually, however, it cannot be easily disregarded in view of the great authority the Court enjoys.

It is by means of advisory opinions that in the past the Permanent Court of International Justice has pronounced itself on problems concerning the ILO, and in particular the problems of its competence. As already mentioned, out of six advisory opinions rendered by the Court, four dealt in a direct or indirect way with the issue of the competence of the ILO, establishing the principle of its unrestricted competence in social matters. It is not by accident that most of the advisory opinions on this matter were sought in the early stage of the activities of the ILO. With the ILO, under the League of Nations system, as the only international organization called upon to deal with social problems, the member states were reluctant to recognize its competence in matters which they considered domestic and exempt from international jurisdiction. They considered any attempt to regulate them by international action as an infringement on their sovereignty, and tried to see how far they could succeed in resisting the extension of international jurisdiction. Their attempts proved unsuccessful, and once the competence of the ILO was established by the Court, they reconciled themselves to the new situation, and the competence of the ILO under the League of Nations system was never challenged again.

Under the United Nations system, there is even less inducement for the Member States to challenge the competence of the ILO, due to the radical environmental changes which have taken place. As already pointed out, the United Nations has been granted an overall competence in social and economic matters; in addition, several new specialized organizations, some of them in fields closely related to that of the ILO, have been created and integrated with the United Nations. These new developments necessarily modified the competence of the ILO, but did not create a new incentive to contest it. As a matter of fact, the member states of the ILO, in disputing the competence of the ILO in its early stage of activities, were

¹⁸ In spite of the clear language, some authors attribute to advisory opinions a binding effect to a greater or lesser extent. See on this point Hudson, *op. cit.*, pp. 455 ff.; Fischer, *op. cit.*, pp. 76 ff.

prompted by the prospect that the matter on which the competence was contested might be declared as falling within their domestic jurisdiction and exempt from international regulation altogether. No such prospect exists now that the United Nations and the many functional organizations cover almost every conceivable field of human activity. Under these circumstances, unless the matter is clearly within domestic jurisdiction, the member states will be careful in challenging the competence of the ILO on a given matter, particularly as it might be claimed by another functional organization. In other words, whereas previously the member states were faced with the dilemma of a matter being subject either to international regulation, or as falling within their domestic jurisdiction, the problem now boils down to its being dealt with by one or another international organization, a point which is of only minor importance to them. Such would be the attitude of the member states even if they were free to bring the issue before the Court. Actually, this is not the case, since questions concerning the mutual relationships between the United Nations and the various specialized agencies have been exempted by the General Assembly in the authorization given to the ILO to request an advisory opinion directly from the International Court of Justice. As for the United Nations, which alone could request an advisory opinion on this matter, it is unlikely to make such a request for reasons already referred to above. With the Court thus virtually prevented from playing a more significant rôle in determining the competence of the ILO, the various specialized agencies and their member states have no other choice than to settle their conflicting claims by way of agreement between themselves or by having recourse to the machinery evolved for that purpose by the United Nations.

V. JURISDICTION OF THE TRIBUNAL ENVISAGED IN ART. 37 (2) OF THE REVISED CONSTITUTION OF THE ILO

Even if access to the International Court of Justice were unrestricted, which is not the case, many disputes concerning the competence of the ILO would probably never reach the Court, in view of a more expeditious procedure which has been provided for in paragraph 2 inserted in Article 37 of the ILO constitution on the occasion of its revision. Following the pattern of similar provisions in the basic instruments of other specialized agencies, the newly inserted provision opens the way for the establishment of a tribunal to decide upon a certain type of disputes concerning the ILO.¹⁹ Compared with the provision of paragraph 1 of Article 37, which

¹⁹ A more thorough evaluation of the new provision is not feasible as long as the rules concerning the appointment of the tribunal have not been elaborated by the Governing Body and approved by the General Conference of the ILO. According to available information, the establishment of such a tribunal is not being contemplated

establishes the jurisdiction of the Court with regard to disputes relating to the interpretation of the ILO constitution or of conventions concluded on its basis, the scope of the new provision is more limited. It empowers the tribunal to render decisions only on disputes or questions relating to the interpretation of conventions concluded under the ILO constitution. In spite of this restriction, however, it seems to cover indirectly the issue of the competence of the ILO which may arise in connection with the interpretation of a convention, as in the case when an extensive interpretation is opposed on the ground that it would be in contradiction with the allegedly limited competence of the ILO.

Unless otherwise provided in the particular convention, only the Governing Body of the ILO and not the individual members of the ILO have access to the tribunal. This restrictive provision does not prevent individual member states from proposing that the matter in dispute be submitted to the tribunal. The final decision rests, however, with the Governing Body. The situation is similar to that prevailing with regard to the advisory opinions which may be requested from the Court only by organs of international organizations and not by individual members.

The status of the tribunal is unequal to that of the International Court of Justice, as evidenced by the directive contained in the provision under discussion that "any applicable judgment or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph."²⁰ The "award" (the term used to describe a decision of the tribunal) has, as in the case of an advisory opinion of the Court, no binding force, not to mention the unequal authority of such tribunal as compared with that of the Court. In the words of the provision "any award made by such a tribunal shall be circulated to

in the near future in view of the fact that the authorization given by the U.N. General Assembly to the ILO enables the latter to approach the Court directly.

²⁰ The provision under discussion is deficient in many respects. The expression "any applicable judgment or advisory opinion" is rather misleading, since the decision of the Court has a binding force only between the parties involved in the dispute and only with regard to that particular case, and the advisory opinions of the Court have no binding force at all. This being so, what the provision actually had in mind was the applicability of the judgment or advisory opinion as a precedent. Another point of interest in the provision is the reference only to the judgments and advisory opinions of the International Court of Justice to the exclusion of those of the Permanent Court of International Justice. It is impossible to state whether this discrimination between the decisions of the two Courts is due to the realization of the authors of the provision that the decisions of the Permanent Court of International Justice might have lost their applicability even as precedents due to the radical environmental changes, or rather to the desire to emphasize that the International Court of Justice should have a clean start. Actually, there was no reason whatsoever to bind the tribunal in advance by any rules concerning its free evaluation of the decisions of any international tribunal as possible precedents. The restrictive provision to that effect is indicative of the inferior status attributed to the tribunal.

the Members of the Organization and any observation which they may make thereon shall be brought before the Conference" which, at its discretion, may accept or reject the award of the tribunal. It is needless to point out that the award of such a tribunal established by the ILO would have no authority with regard to other international organizations.

In spite of all these limitations, it is probable that, once the rules providing for the appointment of such a tribunal have been set forth, any question or dispute concerning the ILO will be brought first of all to the tribunal rather than to the Court. The procedure before such a tribunal would offer a more expeditious determination of a dispute than the far more formalistic and time-consuming procedure before the Court. It is only when the award of the tribunal proves unacceptable to the General Conference of the ILO, and the matter is considered of primary importance, that, within the limitations of the authorization given by the United Nations to the ILO, an advisory opinion of the Court may be sought.

NOTES ON LEGAL QUESTIONS CONCERNING THE UNITED NATIONS

BY YUEN-LI LIANG *

WHO ARE THE NON-MEMBERS OF THE UNITED NATIONS?

When the authors of the Charter of the United Nations had to reject the principle of universality as "an ideal toward which it was proper to aim, but which was not practicable to realize at once,"¹ a clear line was drawn between the Member States of the Organization and those states which are not Members. However, non-member states are not entirely left outside the orbit of the Charter. On the one hand, an obligation is imposed upon the Organization to ensure that states which are not Members of the United Nations "act in accordance with its principles so far as may be necessary for the maintenance of international peace and security."² On the other hand, non-member states are granted various rights in the field of international peace and security; in particular, a non-member state may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party, if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the Charter.³

Certain non-member states have been admitted to membership in the Organization and certain others permitted to become parties to the Statute of the International Court of Justice. At times, non-member states have been invited by the General Assembly to accede to conventions adopted under its auspices,⁴ and by several United Nations organs to participate in their

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¹ UNCIO, Report of the Rapporteur of Committee I/2, Doc. 1178, Vol. 7, p. 326.

² Article 2, paragraph 6 of the Charter.

³ Article 35 of the Charter. See also Articles 11, 32 and 50. Mention should also be made of Article 93, which provides that a state which is not a Member may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly and the Security Council.

⁴ It may be noted that invitations to accede to an international convention had been extended in a previous case to all non-member states. By resolution 211(III) of Oct. 8, 1948, the General Assembly invited all states non-members to sign or accept the Protocol bringing under International Control Drugs Outside the Scope of the Convention of July 13, 1931. General Assembly, 3rd Sess., Pt. I, Official Records, Resolutions, p. 62. In pursuance of this resolution, and in accordance with the provision of General Assembly resolution 54(I) (General Assembly, 1st Sess., Pt. II, Official Records, Resolutions, p. 81), the Secretary General invited the following non-member states (excepting

activities.⁵ In the course of the discussions leading to these decisions by United Nations organs, it was often necessary to determine what communities were to be treated as non-members. Indeed, before a community can be regarded as a non-member, it is important first to ascertain whether it is a state under international law. The Charter contains, of course, no provision which can serve as a guide. The purpose of the present note is to indicate certain criteria which have been used for determining which communities are to be treated as "non-member states" for some specific purposes.

I. DETERMINATION OF STATEHOOD IN VARIOUS ORGANS OF THE UNITED NATIONS

1. *Applications for Membership in the United Nations*

The original Members of the United Nations are those states which participated in the United Nations Conference on International Organization at San Francisco, or had previously signed the Declaration by United Nations of January 1, 1942.⁶ Membership in the United Nations is also open to all other peace-loving "States" which accept the obligations contained in the Charter and, "in the judgment of the Organization, are able and willing to carry out these obligations."⁷ To date nine states have been admitted⁸ and fifteen others have applied for membership in the Organization.⁹ The reasons for which these latter applicants have not been admitted to the Organization go beyond the scope of this note.¹⁰ The applications of Austria, Ceylon, Jordan, Nepal, and the Mongolian People's Republic, however, are of particular interest, for in each case it was alleged that the

Spain) who were parties to the agreements, conventions and protocols on narcotic drugs concluded in 1912, 1925, 1931 and 1936: Albania, Austria, Ceylon, Bulgaria, Finland, Hungary, Ireland, Italy, Liechtenstein, Portugal, Rumania, San Marino and Switzerland.

⁵ See the survey in O. Schachter, "The Development of International Law through the Legal Opinions of the United Nations Secretariat," *British Year Book of International Law*, Vol. 25 (1948), pp. 91, 115-122. When the question arose which states should be invited to take part in the United Nations Maritime Conference which met in Geneva in 1948, the Economic and Social Council by resolution 35(IV) of March 28, 1947, requested the Secretary General to invite the following governments to participate in the Conference: Albania, Austria, Bulgaria, Finland, Hungary, Ireland, Italy, Portugal, Rumania, Switzerland, Transjordan and Yemen. Economic and Social Council, 4th Sess., Official Records, Resolutions, p. 8. In the case of the United Nations Conference on Road and Motor Transport, the Economic and Social Council, by resolution 147B (VII) of Aug. 28, 1948, instructed the Secretary General "... to invite to participate in the Conference . . . the States not members of the United Nations which were invited to participate in the United Nations Maritime Conference; . . ." Economic and Social Council, 7th Sess., Official Records, Resolutions, p. 8.

⁶ Article 3 of the Charter.

⁷ Article 4 of the Charter.

⁸ Afghanistan, Burma, Iceland, Indonesia, Israel, Pakistan, Sweden, Thailand, Yemen.

⁹ Albania, Austria, Bulgaria, Ceylon, Finland, Hungary, Ireland, Italy, Jordan, Republic of Korea, Korean People's Republic, Nepal, Portugal.

¹⁰ See this JOURNAL, Vol. 43 (1949), pp. 288-311, for a note on this question.

applicants were not fully independent and sovereign states;¹¹ and all these applications failed, as they did not receive the concurrent votes of all the permanent members of the Security Council.¹²

When the application of the Mongolian People's Republic was first considered by the Committee of Admission of the Security Council in 1946, a number of representatives opposed the admission of the applicant on the ground that available information was not sufficient to show that Mongolia was in fact an independent state.¹³ Moreover, the fact that the Mongolian People's Republic maintained diplomatic relations with only one country was mentioned as an indication that Mongolia was not yet ready to take her place as a member of the world community.¹⁴ On the other hand, the representative of Poland stated that there could be no doubt as to its sovereignty, since the Mongolian People's Republic had been officially recognized by the two neighboring countries and diplomatic relations had already been established with one state.¹⁵

Similar doubts were raised with regard to Jordan (previously Trans-jordan). The representative of Poland wondered whether Jordan had in fact obtained her *de jure* and *de facto* independence, and the representative of the Soviet Union declared that he could not support the applicant, for there were no diplomatic relations between the Soviet Union and Jordan.¹⁶ The representative of the United Kingdom, on the other hand, recalled the resolution of the League of Nations of April 18, 1946, which stated that the Assembly welcomed the termination of the mandate status of Jordan. When the application of Ceylon came up for consideration in the Security Council in 1948, the Government of Ceylon had transmitted a letter of information on the independent status and democratic character of the country.¹⁷ The

¹¹ In order to be admitted to membership in the United Nations, the applicant must first of all fulfil the requisite conditions; one of them is that it be "a State." See Advisory Opinion of the International Court of Justice of May 28, 1948, on Conditions of Admission of a State to Membership in the United Nations (I.C.J. Reports, 1949, p. 62), this JOURNAL, Vol. 42 (1948), p. 927.

¹² Article 4, paragraph 2, of the Charter provides: "The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council." See Advisory Opinion of the International Court of Justice of March 3, 1950, on Competence of the General Assembly for the Admission of a State to the United Nations (I.C.J. Reports, 1950, p. 10), this JOURNAL, Vol. 44 (1950), p. 582.

¹³ Security Council, 1st Year, 2nd Sess., Official Records, Supp. No. 4, pp. 64-67; *ibid.*, 2nd Year, Spec. Supp. No. 3, pp. 8-13.

¹⁴ The Chinese representative stated that he did not insist that "the Mongolian People's Republic being a small country, must maintain diplomatic and commercial relations with all nations." Security Council, 1st Year, 2nd Sess., Official Records, Supp. No. 4, p. 65.

¹⁵ Security Council, 2nd Year, Official Records, Spec. Supp. No. 3, p. 11.

¹⁶ *Ibid.*, 1st Year, 2nd Sess., Supp. 4, p. 70.

¹⁷ *Ibid.*, 3rd Year, Supp. for August, 1948, pp. 109-117.

representative of the United Kingdom, moreover, declared that that document gave "a considerable amount of information proving the full independence of Ceylon." However, the representative of the Soviet Union stated that the information was insufficient and consequently submitted a draft resolution to postpone the consideration of Ceylon's admission to the United Nations "until such time as full information on the status of the Government and on its constitution as well as sufficient proof that Ceylon is a sovereign and independent State has been received from the Government of Ceylon."¹⁸ The same objections were raised with respect to Nepal¹⁹ and the Committee of Admission of the Security Council adopted a resolution requesting the Government of Nepal to supply additional information concerning its sovereignty and independence.²⁰ In the case of Austria, it was asserted by some representatives that the occupation imposed such limitations upon her independence and sovereignty that she was regarded as not being qualified for membership until after the peace treaty had been concluded. On the other hand, the representative of the United States stated that the absence of the treaty did not disqualify that country from membership in the United Nations.²¹

2. Applications to become Parties to the Statute of the International Court of Justice

As previously indicated, the Charter envisages the participation of non-member states in some of its activities. Under Article 93, a state which is not a Member may become a party to the Statute of the International Court of Justice "on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council." To date, two non-member states have become parties to the Statute of the Court, namely, Switzerland and Liechtenstein.²²

The application of Switzerland did not give rise to difficulties. When the Chief of the Swiss Federal Political Department expressed the desire of the Swiss Federal Council to ascertain the conditions on which Switzerland could become a party to the Statute of the International Court of Justice, the Security Council referred the matter to its Committee of Experts for consideration and report.²³ The Committee's report was approved without discussion by the Security Council at its 80th meeting on

¹⁸ Security Council, 3rd Year, Official Records, No. 105, pp. 3-22. This motion for postponement was defeated. A formal motion recommending Ceylon's admission was rejected (nine votes in favor, two against, one of the negative votes being that of a permanent member).

¹⁹ Security Council, 4th Year, Official Records, No. 39, p. 6.

²⁰ U.N. Doc. S/1382.

²¹ Security Council, Official Records, Spec. Supp. No. 3, p. 24.

²² Switzerland became a party on July 28, 1948; Liechtenstein on March 10, 1950.

²³ Security Council, 5th Year, Official Records, 2nd Ser., No. 20, pp. 485-487.

November 15, 1946.²⁴ Subsequently, the General Assembly considered and adopted,²⁵ on the recommendation of its Sixth Committee, the report and recommendations of the Security Council.²⁶

The application of Liechtenstein, however, gave rise to discussion as to whether the applicant was or was not a state in international law. By a letter dated March 6, 1949,²⁷ the Government of the Principality of Liechtenstein expressed the desire to learn the conditions under which it could become a party to the Statute of the International Court of Justice. The Security Council, at its meeting on April 8, 1949, decided to refer this letter to its Committee of Experts for consideration and report.²⁸ During the discussion of the Committee's report²⁹ the representatives of the Soviet Union and of the Ukrainian Soviet Socialist Republic were of the opinion that under Article 93, paragraph 2, of the Charter, the parties to the Statute of the International Court of Justice had to be independent and sovereign states. In their view this article did not mean that any state, whatever it may be, could become a party to the International Court of Justice. They pointed out that apparently Liechtenstein had yielded important parts of its sovereignty to another state. Liechtenstein did not have an army of its own; it did not conduct its foreign affairs independently, but did so only through Switzerland; it did not have its own currency, postal organization, telegraph administration; and it was a member of a customs union with Switzerland. In view of these facts, they concluded that Liechtenstein was not a sovereign and independent state.³⁰ The majority of the members of the Committee maintained that Liechtenstein was a state in the sense of Article 93, paragraph 2, since it possessed

²⁴ *Ibid.*, 1st Year, 2nd Ser., No. 22, p. 502.

²⁵ By resolution 91(I) of Dec. 11, 1946, the General Assembly determined the conditions on which Switzerland could become a party to the Statute of the International Court of Justice as follows:

"Switzerland will become a party to the Statute of the Court on the date of the deposit with the Secretary-General of the United Nations of an instrument, signed on behalf of the Government of Switzerland and ratified as may be required by the Swiss constitutional law, containing: (a) acceptance of the provision of the Statute of the International Court of Justice; (b) acceptance of all the obligations of a Member of the United Nations under Article 94 of the Charter; (c) an undertaking to contribute to the expenses of the Court such equitable amount as the General Assembly shall assess from time to time after consultation with the Swiss Government." (General Assembly, 1st Sess., Pt. II, Official Records, Resolutions, pp. 182-183.)

²⁶ It may be pointed out that in its report the Committee of Experts stated that the obligations imposed by Art. 94 of the Charter upon a Member of the United Nations "should apply equally to non-members of the United Nations which become parties to the Statute and to non-parties which are allowed access to the Court." See Annex to General Assembly resolution 91(I), *ibid.*, p. 183.

²⁷ U.N. Docs. S/1298 and S/1298/Corr. 1.

²⁸ Security Council, 4th Year, Official Records, No. 26, pp. 16, 17.

²⁹ U.N. Doc. S/1342.

³⁰ Security Council, 4th Year, Official Records, No. 35, pp. 2-5.

all the qualifications of a state.³¹ The majority of the Security Council agreed with the opinion of the majority of the Committee of Experts, moreover, that it was all the more useful for Liechtenstein to become a party to the Statute of the Court, since it was a small state and the protection of the law was most necessary in such a case. Consequently, the Security Council recommended to the General Assembly that Liechtenstein be allowed to become a party to the Statute of the Court on the same terms as Switzerland.³²

The report of the Security Council was referred by the General Assembly to its Sixth Committee for consideration and report. In the course of the deliberations on this matter, only the representative of the Byelorussian S.S.R. opposed the application, giving the same arguments as had been previously made in the Security Council.³³ Upon the recommendation of the Sixth Committee, the General Assembly, by resolution 363(IV) of December 1, 1949, approved the application of Liechtenstein to become a party to the Statute of the International Court of Justice.³⁴

3. *Approval of Applications for Membership in Specialized Agencies*

Two of the agreements defining the terms on which the specialized agencies have been brought into relationship with the United Nations contain a special provision regarding membership in the agencies concerned.³⁵ The agreement between the United Nations and the UNESCO provides in Article II that applications submitted by states not Members of the United Nations shall be immediately transmitted to the Economic and Social Council, which "may recommend the rejection of such applications." Any such recommendation "shall be accepted" by UNESCO.³⁶ The agreement with ICAO contains a similar provision. Article II provides that applications for membership from states, other than those provided for in Articles 91 and 92(a) of the Convention on International Civil Aviation (namely, states signatory to the Convention, states Members of the United Nations and states associated with them and states which remained neutral during the second World War), shall at once be referred to the General

³¹ The representative of Egypt pointed out that Liechtenstein had a territory, a population, a government and that the customs union with Switzerland itself stipulated that the customs union is "without prejudice to the sovereign rights of the Prince of Liechtenstein." *Ibid.*, p. 4.

³² *Ibid.*, p. 6.

³³ General Assembly, 4th Sess., Official Records, Sixth Committee, p. 214.

³⁴ *Ibid.*, Resolutions, p. 63.

³⁵ The General Assembly, by resolution 50(I) of Dec. 14, 1946, approved the agreements with the ILO, UNESCO, FAO and ICAO. General Assembly, 1st Sess., Pt. II, Official Records, Resolutions, p. 78. By resolution 124(II) of Nov. 15, 1947, the General Assembly approved the agreements with WHO, UPU, ITU, Bank and Fund. General Assembly, 2nd Sess., Official Records, Resolutions, p. 28.

³⁶ Art. 2 further provides that "if within six months of the receipt of an application by the Council, no such recommendation has been made, the application shall be dealt with according to Article 2, para. 2, of the Constitution of the Organization." U.N. Doc. A/77.

Assembly of the United Nations, which may within one year recommend rejection.³⁷

UNESCO, acting in pursuance of Article II of its agreement with the United Nations, forwarded to the Economic and Social Council applications for membership in the agency from the following non-member states of the United Nations: Austria, Italy, Switzerland, Hungary, Monaco, Ceylon, the German Federal Republic, Viet-Nam and Japan.³⁸ With respect to Austria, Italy and Switzerland, the Council considered these applications at its fourth session and approved them without comment.³⁹ The application of Hungary was considered by the Council at its fifth session and was approved with one dissenting vote.⁴⁰ The application of Monaco brought forward the question as to whether Monaco, a "diminutive state," could become a member of an international organization.⁴¹ In its resolution 137 (VI) of February, 1948, the Economic and Social Council employed the standard formula of "no objection" in connection with the application of Monaco, but in addition recommended that UNESCO, in considering the application, should "take into account what contribution Monaco can make in furthering the programme of the Organization"; it suggested, moreover, that UNESCO, in taking its decision, should also consider "the general problem of the admission of similar diminutive States."⁴² The application of Ceylon gave rise to no difficulty.⁴³

ICAO has transmitted to the General Assembly, in accordance with Article II of its agreement with the United Nations, applications for membership in the agency from the following states not Members of the United Nations: Italy, Austria and Finland. The General Assembly considered

³⁷ U.N. Doc. A/106.

³⁸ The applications of the German Federal Republic, Viet-Nam and Japan have been forwarded to the Economic and Social Council for consideration at its twelfth session. See U.N. Docs. E/1883 and E/1883/Add.1.

³⁹ Resolution 59(IV) of March 24, 1947, ECOSOC, 4th Sess., Official Records, Resolutions, p. 51.

⁴⁰ Economic and Social Council resolution 94(V) of July 21, 1947, ECOSOC, 5th Sess., Official Records, Resolutions, p. 86. For discussion of that application see ECOSOC, 5th Sess., Official Records, Plenary Meetings, pp. 20-21.

⁴¹ In answer to a question on the number and importance of similar states, Mr. A. H. Feller (General Counsel, U.N. Secretariat) stated that it was customary to include San Marino, Liechtenstein and the Republic of Andorra in the same category. U.N. Doc. E/SR.125.

⁴² ECOSOC, 6th Sess., Official Records, Resolutions, p. 46. The Third General Conference of UNESCO duly considered this matter in December, 1948, and recommended that the Executive Board of the Organization should consider each application for membership from "diminutive States on its own merits, taking into particular consideration the legal status of the country in question." Monaco was admitted to membership without opposition. See ECOSOC, 4th Year, 9th Sess., Official Records, Supp. 17, p. 46.

⁴³ Resolution 213(VIII) of Feb. 11, 1949, ECOSOC, 8th Sess., Official Records, Resolutions, p. 21.

these applications at its second and third sessions and recorded that it has no objection to the admission of the applicants to ICAO.⁴⁴

II. ACCESSIONS TO THE GENOCIDE CONVENTION

The General Assembly at its 179th plenary meeting on December 9, 1948, unanimously approved the Convention for the Prevention and Punishment of the Crime of Genocide, and proposed it for signature and ratification or accession in accordance with its Article XI. Under the provisions of this article, the Convention was open until December 31, 1949, for signature and after January 1, 1950, for accession "on behalf of any Member of the United Nations and of *any non-member state* to which an invitation to sign has been addressed by the General Assembly."⁴⁵ It therefore rested with the General Assembly to designate the non-member states which it wished to invite to become parties to the Convention. Consequently, the Secretary General placed this question on the provisional agenda of the fourth session of the General Assembly, 1949, which in turn referred it to its Sixth Committee for consideration.⁴⁶

Proposed Criteria to Designate the Non-Member States to which an Invitation Would be Sent

In the course of the discussion three main criteria were advanced:

- (a) *Non-member states which are members of specialized agencies or parties to the Statute of the I.C.J.*

Early in the deliberations of the Sixth Committee on this matter the delegations of Australia and Cuba submitted a joint draft resolution,⁴⁷ by which

⁴⁴ Resolutions 121(II), 122(II) of Oct. 31, and Nov. 1, 1947, respectively. General Assembly, 2nd Sess., Official Records, Resolutions, pp. 25-26; and resolution 203(III) of Nov. 1, 1948, General Assembly, 3rd Sess., Pt. I, Official Records, p. 42. In the course of the discussion in the Second Committee, however, the representative of the Soviet Union challenged Austria's freedom of action in matters of civil aviation, pending the conclusion of a peace treaty, but no question was raised as to whether Austria was or was not a state. General Assembly, 2nd Sess., Official Records, Second Committee, pp. 91-92.

⁴⁵ General Assembly, 3rd Sess., Pt. I, Official Records, Resolutions, p. 176.

⁴⁶ U.N. Docs. A/932 and A/994. The General Assembly has also referred to the Sixth Committee an item entitled "Designation of non-member States to which a certified copy of the Revised General Act of the Pacific Settlement of International Disputes shall be communicated by the Secretary-General for the purpose of accession to this Act." While the problem involved was similar to the one under consideration, the Sixth Committee recommended to the General Assembly that it defer this item to a later date, in view of the fact that no State Member of the U.N. had as yet adhered to the Revised General Act. See General Assembly, 4th Sess., Official Records, Resolutions, 1949, p. 66. At its fifth session, in 1950, the General Assembly "decided to defer until the sixth session consideration of the question." *Ibid.*, 5th Sess., Supp. 20, p. 75.

⁴⁷ U.N. Docs. A/C.6/L.99 and Corr.1.

they suggested sending invitations to accede to the Convention to those non-member states which were active members of one or more of the specialized agencies, or which were parties to the Statute of the International Court of Justice. In support of this joint draft resolution, the representative of Australia explained that an attempt had been made to find a criterion which would permit the greatest possible number of non-member states to accede to the Convention, on condition that they had expressed a desire to advance international coöperation. Active membership in one or more of the specialized agencies of the United Nations or the fact of being a party to the International Court of Justice could constitute such a criterion. As the specialized agencies were closely connected with the Organization under Article 63 of the Charter, which provided for the conclusion of agreements between the Economic and Social Council and the agencies concerned and thus promoted their integration within the framework of the United Nations, the Australian representative felt it justifiable to state that participation in the activities of those agencies was clear evidence of the desire of non-member states to advance international coöperation.⁴⁸

Some delegations considered that criterion sufficiently large to avoid any political discussion as to which non-member states would receive invitations, and that such a criterion could be applied in cases other than that of addressing invitations to adhere to the Convention on Genocide.⁴⁹

The criterion contained in the Australian-Cuban proposal was opposed by the representative of France, who expressed the view that it was inopportune and premature to invite non-member states to accede to the Convention before most Member States themselves had acceded to it. But even if the principle of addressing invitations to non-member states were recognized, the General Assembly should not adopt as a criterion the participation in one or more of the specialized agencies. He pointed out that specialized agencies had been established by inter-governmental agreements and were not organs of the United Nations. "By adopting participation in those agencies as a criterion," he said, "the United Nations would show that it was unable itself to lay down the factors which should determine its choice." Moreover, he wondered whether participation in the activities of the specialized agencies represented the most valid expression of a desire to advance international coöperation.⁵⁰

(b) *All non-member states subject to General Assembly resolutions in force*

In the course of the discussion other criteria were suggested. The representative of France urged the adoption of a simpler procedure, namely, to

⁴⁸ General Assembly, 4th Sess., Official Records, Sixth Committee, 208th Meeting, p. 450.

⁴⁹ See statements by the representatives of Belgium and the United Kingdom. *Ibid.*, pp. 452-453.

⁵⁰ *Ibid.*, p. 451.

invite all non-member states to become parties to the Convention, subject to the resolutions in force.⁵¹ This suggestion was supported by the representatives of Egypt, Lebanon and the U.S.S.R. The representative of Lebanon, wishing to eliminate the restrictive elements of the joint Australian-Cuban proposal, proposed that in the second paragraph of its preamble the words "by their participation in the activities of the United Nations" should be deleted, and that the whole third paragraph should be replaced by the following paragraph:

Decided to request the Secretary-General to despatch the invitations above-mentioned to all non-member States who had indicated or will indicate their desire to accede to the Convention.⁵²

This criterion was opposed by the representatives of Australia and the United Kingdom on the ground that the adoption of so general an expression would place the Secretary General in the very difficult position of having to prepare a list of all the non-member states of the world.⁵³ Subsequently, the representative of Lebanon withdrew his amendment.⁵⁴

(c) *Non-member states which had applied for membership in the United Nations*

The Delegation of the Soviet Union suggested a further criterion. Its representative in the Sixth Committee wondered what states were intended to be excluded if the criterion embodied in the joint Australian-Cuban draft resolution were adopted,⁵⁵ and whether there was not a manifest desire to exclude certain states, particularly the Mongolian People's Republic and the Democratic People's Republic of Korea. He noted that the joint proposal mentioned the desirability of sending invitations to those non-

⁵¹ General Assembly Resolution 39(I) of Dec. 12, 1943, on Relations of Members of the United Nations with Spain recommended that "the Franco Government of Spain be debarred from membership in international agencies established by or brought into relationship with the United Nations, and from participation in conferences or other activities which may be arranged by the United Nations, or by these agencies, until a new and acceptable government is formed in Spain." General Assembly, 1st Sess., Pt. II, Official Records, Resolutions, 1946, p. 63. On November 4, 1950, by resolution 386(V) the General Assembly resolved "to revoke the recommendation intended to debar Spain from membership in international agencies established by or brought into relationship with the United Nations." General Assembly, 5th Sess., Official Records, Supp. No. 20, p. 16.

⁵² General Assembly, 4th Sess., Official Records, Sixth Committee, pp. 453-454.

⁵³ *Ibid.*, pp. 452, 455.

⁵⁴ *Ibid.*, p. 456.

⁵⁵ In reply, the Assistant Secretary General in charge of the Legal Department said that if the criterion chosen by the authors of the joint draft resolution were adopted, the following non-member states would not be invited: Andorra, the Republic of Korea, Germany, Japan, the People's Republic of Mongolia, Nepal, the Republic of San Marino, and Spain. General Assembly, 4th Sess., Official Records, Sixth Committee, p. 454.

member states which, by their participation in the activities of the United Nations, "had expressed a desire to advance international coöperation." By applying for membership in the United Nations, however, a state expressed far more clearly its desire to advance international coöperation than by adhering to some highly technical specialized agency. Consequently, he moved, as a formal amendment, the addition of the following phrase: "or which has applied for membership in the United Nations" at the end of the third paragraph of the joint draft resolution.⁵⁶

This criterion was strongly opposed by some other delegations. The representatives of Australia and the United States pointed out that, if the U.S.S.R. amendment were adopted, the Secretary General would have to decide which of the entities that have applied for membership in the United Nations were in effect sovereign and independent states. Inasmuch as there existed a divergence of views on that point on the part of various governments, the Secretary General would be called upon to make a very difficult political decision.⁵⁷ The Soviet amendment was rejected.⁵⁸

(d) *Meaning and scope of the expression "active member"*

The expression "active member" gave rise to considerable discussion. The Australian-Cuban draft resolution had proposed that the Secretary General be requested to despatch the invitations to each non-member state which is an "active member" of one or more of the specialized agencies, or which is a party to the Statute of the International Court of Justice.

Early in the debate, the Australian representative explained that the expression "active member" had been purposely introduced to exclude certain states whose participation in the work of two specialized agencies had been suspended. Thus, Spain, which had been automatically suspended from membership in the Universal Postal Union for ceasing its contributions and which had withdrawn its delegation from the International Civil Aviation Organization, could not be considered as an active member of those two specialized agencies.⁵⁹

The representative of the United Kingdom, however, thought that the wording of the joint draft resolution restricted the criterion by limiting the invitations to non-member states which were active members of the

⁵⁶ *Ibid.*, p. 458.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, p. 459.

⁵⁹ *Ibid.*, pp. 450 and 452. Art. XVI of the Final Protocol of the XIIth Universal Postal Congress, signed in 1947, prevents Germany, Japan, Korea, Spain, Spanish Morocco and the Spanish Colonies from adhering to the Convention until such time as relations are again regularized. Spain, Spanish Morocco and the Spanish Colonies were restored to full membership in 1950. On May 13, 1947, the Assembly of the International Civil Aviation Organization voted an amendment to the constitutional instrument of the Organization which would enable it to expel Spain; the amendment must be ratified by two-thirds of the member states of the International Civil Aviation Organization.

specialized agencies at the present time. To avoid such restriction, and in order that members which subsequently become active members of a specialized agency should be invited to adhere to the Convention, he proposed to add the words "which is or may become hereafter an" before the words "active member."⁶⁰ This amendment was made with the understanding that the expression "non-member states" meant "sovereign, completely independent States, responsible for their foreign relations."⁶¹

The representatives of France and the U.S.S.R., on the other hand, were of the opinion that the expression "active member" as further qualified by the representative of the United Kingdom amounted to giving *carte blanche* to the specialized agencies to decide which states should be invited to accede to the Convention, because it would be the responsible organs of the specialized agencies themselves which would determine the time at which the exclusion of Japan, Germany and Spain would cease. Moreover, a legal definition of the word "active" was difficult as there were not, to their knowledge, two categories of membership in the specialized agencies.⁶² Consequently, the representative of France proposed to set a definite time-limit in order to restrict the invitations to those non-members which were "active" members of specialized agencies on December 1, 1949. By way of clarification, the Assistant Secretary General in charge of the Legal Department stated that the non-member states which would be considered "active members" of specialized agencies as of December 1, 1949, were: Albania, Austria, Bulgaria, Ceylon, Finland, Hungary, Ireland, Italy, the Hashemite Kingdom of Jordan, Republic of Korea, Monaco, Portugal, Rumania, and Switzerland. He added that thus Liechtenstein would automatically be excluded from participation, because it would not yet have become a party to the Statute of the International Court of Justice; and also Indonesia,⁶³ because it might not be possible for it to deposit its instrument of ratification with the Food and Agriculture Organization within that time. The representative of France thereupon changed the proposed time-limit to January 1, 1950.⁶⁴ The French amendment was not accepted by the Committee.

As the discussion neared an end, the main issue was whether the Sixth Committee wished to retain the word "active." Upon a motion by Lebanon, the Sixth Committee decided to delete the word "active." As it was felt that Germany, Japan and Spain might have to be invited if the word

⁶⁰ General Assembly, 4th Sess., Official Records, Sixth Committee, p. 455. The representatives of Australia and Cuba accepted this suggestion. *Ibid.*, p. 454. As the words "or may become" might be interpreted as "has the right to become," the representative of the United Kingdom proposed the addition of "hereafter become." *Ibid.*, p. 456.

⁶¹ *Ibid.*, p. 455.

⁶² *Ibid.*, pp. 454, 457.

⁶³ Subsequently, on Sept. 28, 1950, by a resolution adopted at its 289th plenary meeting, the General Assembly, upon the recommendation of the Security Council, admitted the Republic of Indonesia to membership in the United Nations. U.N. Doc. A/1407.

⁶⁴ General Assembly, 4th Sess., Official Records, Sixth Committee, p. 456.

"active" was deleted from the text, the Sixth Committee subsequently decided to reconsider the question and finally the word "active" was retained. The joint draft resolution as a whole was adopted by the Sixth Committee⁶⁵ and subsequently by the General Assembly.⁶⁶

Non-Member States Invited to Accede to the Genocide Convention

In pursuance of General Assembly resolution referred to above, the Secretary General on December 6, 1949, addressed an invitation to accede to the Convention to the following non-member states: Austria, Bulgaria, Ceylon, Finland, Hungary, Ireland, Italy, the Hashemite Kingdom of Jordan, the Republic of Korea, Monaco, Portugal, Rumania, and Switzerland.

On November 28, 1949, the United States of Indonesia, and on November 27, 1950, the Federal Republic of Germany, deposited their instruments of acceptance of the Constitution of FAO. On March 10, 1950, the Secretary General received the declaration of Liechtenstein to become a party to the Statute of the International Court of Justice. And, finally, on May 17, 1950, Cambodia, Laos and Viet-Nam deposited their instruments of acceptance of the Constitution of the WHO. Consequently, the Secretary General addressed to the United States of Indonesia on March 27, 1950, to Liechtenstein on April 10, 1950, to Cambodia, Laos and Viet-Nam on May 31, 1950, and to the Federal Republic of Germany on December 20, 1950, invitations to accede to the Convention on Genocide.⁶⁷

⁶⁵ *Ibid.*, pp. 458-462.

⁶⁶ *Ibid.*, Plenary Meetings, p. 497.

⁶⁷ As this Note goes to press the following new developments have occurred: On Feb. 20-23, 1951, the Trusteeship Council adopted new rules of procedure granting to Italy the right "to designate a representative who may be present at all sessions of the Trusteeship Council and who may participate without vote in the deliberations relating specifically to the Trust Territory of Somaliland under Italian administration" and "in the deliberations of the Council on general questions relating to the operation of the International Trusteeship System." At the same time the Trusteeship Council decided to request the General Assembly to examine at its sixth session the question of a fuller participation of Italy in the work of the Trusteeship Council. U.N. Docs. T/847 and T/848.

On March 14, 1951, the Economic and Social Council approved the applications for membership in the UNESCO of the following countries: German Federal Republic, Japan, Viet-Nam, Laos and Cambodia. Journal of the United Nations No. 55 (March 15, 1951), p. 5.

On March 16, 1951, the Economic and Social Council adopted a resolution declaring that the German Federal Republic and Monaco may accede to the Convention on Road Traffic. *Idem*, No. 57 (March 19, 1951), p. 10.

EDITORIAL COMMENT

LIBERAL AND TOTALITARIAN ATTITUDES CONCERNING INTERNATIONAL LAW AND ORGANIZATION

By general admission these are difficult and dangerous days for international law and international organization. Not for all international law, indeed—for certain branches thereof are developing very vigorously—but for some of the older branches of the law and for some of its basic theoretical aspects. Not for international organization as such—there could be little doubt concerning its general value or its viability—or concerning the older type of special international agency, but concerning the omnibus organization of the type of the United Nations, especially in respect of the attempt to provide peace and security by community enforcement action.

Is it possible to discover any one main source of these dangers apart from the many difficulties naturally inherent in international relations, co-operation, organization, and the law that enshrines them? It is believed that this is possible, and that it may help, in the effort to arrest and reverse the current disintegration, to point them out tentatively.

The most dangerous threat to international law and organization existing today appears to stem from two groups of people—lay citizens, officials, organizations (national and international)—who in many other ways would appear to be found at opposite poles of the social and political spectrum. They may be designated hypothetically as the liberals and the totalitarians. They require, however, some further identification.

The liberals should be, by etymology and by tradition, the devotees of freedom—freedom of thought, word, and action—deriving from the revolutions of the sixteenth, seventeenth and eighteenth centuries. Actually, in their late nineteenth and early twentieth-century incarnation, they are, to judge strictly by the current usage of the word, humanitarians, many of them very prosperous and philanthropic persons, stemming from the great humanitarian movement, mainly English in origin and development, of the same period. Their chief aim has been alleviation of the sufferings of those human beings who for one reason or another—the reason being irrelevant in the heart of the humanitarian—lack health, food, clothing, or other of the essentials of decent life. And the humanitarians, when they consider the matter, attribute these sufferings, which they feel impelled to remedy, to that free economic system which has also been described as liberalism! The implication concerning the liberal's opinion of human equality is very interesting. This leads them, somewhat paradoxically, to sympathize with the totalitarians, who also profess to aim at the alleviation of the lot of the masses by abolishing liberalism!

The totalitarians, on their side, have, of course, simply laid hold of a device or a technique which has nothing to do with any particular subject-

matter content. Its essence consists of a denial of freedom and individualism in favor of complete group control. It is a technique which might be employed for the promotion of a religious creed or any economic interest, proletarian or plutocratic, or any other aim. It is actually employed by devotees of Marxian Communism—protagonists of the needy masses—but it has been employed by German National Socialism, Italian Fascism, and numerous other institutions or movements which shall be nameless here. The aims of the totalitarians sometimes appear to resemble the altruistic aims of the "liberals," but for the most part appear to be, on the contrary, decidedly selfish in character.

What has all this to do with international law and organization? Just this: Both the "liberals" or humanitarians, and the totalitarians, for somewhat diverse reasons, attack those principles, institutions, and procedures which seem to hold the greatest promise for the development of international justice, law, order, security, and peace. Of course the "liberals" and the totalitarians have inevitably been compelled to devote some attention to the problem of international relations because of its involvement with all questions of social welfare. It is the tragedy of our time that the most serious opposition to world peace and justice comes from both the most vicious and the most righteous of sources.

Thus the humanitarians support the totalitarians (Communists, in the main, today) in criticism of capitalism and imperialism. They are also, in large numbers, pacifists, and as such oppose military action (either preventive, or sanctions, or even defense) against aggression. They question the validity of this last category and even feel some doubts about international law and administration, as being too closely identified with the regime of nationalism and war. Of course not all "liberals" or humanitarians are pacifists, and for that matter not all "pacifists" are pacifists, but the situation remains substantially as described.

The Communists, in their turn, oppose international organization, law, and administration as tools of capitalist imperialism. This is in part merely the application of orthodox Marxism; in part it is the emotional reaction of individuals who feel themselves to be cheated of their just deserts. Contemporary psychology would indicate that it is, however, not lack of capacity so much as lack of motivation—especially social motivation—which explains the state of affairs respecting the "underprivileged."

The result is that international law, international organization, and international administration are opposed by the totalitarian opponents of individualistic capitalism on the ground that they are but tools of the imperialists, while they are sabotaged, at the very least, by the "liberals" because they are too closely associated with economic inequality, exploitation (national and international), and war. It is quite probable that the totalitarians—today the so-called Communists, although their dangerous character flows not so much from their attitude on strictly economic matters concerning capitalist and proletarian as from their technique of dictator-

ship, especially in the international sphere—are far more dangerous than the “liberals,” but it seems regrettable that this unholy alliance should exist.

Finally we may ask for a verdict on the “liberal”-totalitarian attitude—frankly admitting that we desire international peace and justice and believe that international law and organization are essential to these ends—and for a tentative formula of procedure for the immediate future. Now the principal defect of the opposition to international law and order appears to reside in its oversimplicity. International law is not always perfect and at times should be modified or put aside or defied—this is true of all law—in the interests of peace and justice. International organization and administration are very defective and should be supported and employed with discretion. But any dogmatic and complete opposition to the national state, international law and organization, and peace and order, based on international authority, whether for partisan purposes employing totalitarian techniques or for “liberal” humanitarian purposes, seems too simple to correspond with reality and contrary to the welfare of the international community and of humanity.

What can be done about this situation? The countries—peoples and governments—remaining faithful to the principles of liberty, law and order based on voluntary agreement, justice and peace, must remain strong and outlast the totalitarian adventure. Everything possible must be done to demonstrate the value of world-wide understanding and coöperation—through law and organization—again on a basis of mutual consent. To this outcome the “liberals” might—perhaps, may—be expected to lend their support. Perhaps the totalitarian international anarchists may yet be convinced of the futility of their effort.

PITMAN B. POTTER

INTERNATIONAL LAW BY ANALOGY

Some years ago at an annual meeting of the American Society of International Law, as this writer recalls, there was a discussion from the floor as to cases decided by the United States Supreme Court concerning river boundaries between States of this Union. The opinion was voiced tentatively that this Court perhaps no longer applies international law in such cases and that perhaps the maxim “International law is a part of the law of the land” is in decline. Such and similar opinions, it is submitted, are based on two theoretical errors and it is the purpose of this paper to clarify them.

The first error has to do with the legal significance of the quoted maxim which, it is said, is typical of the Common Law.¹ That international law,

¹ See on this problem: Blackstone, *Commentaries upon the Laws of England*, Bk. IV, Ch. 5; J. B. Moore, *A Digest of International Law* (Washington, 1906), Vol. I, pp. 9-11; Picciotto, *The Relation of International Law to the Laws of England and of the United States* (1915); H. Lauterpacht, “Is International Law a Part of the

to its *full extent*, is a part of the law of England and of the United States, has been stated frequently by English and American judges.² There are, further, Article VI, clause 2 of the Constitution of the United States and articles in recent European constitutions.³

Where such municipal rules are in force, international law can thus far be directly and immediately applied by national courts. But even under such an hypothesis, the international and municipal validity need not necessarily coincide. For instance, treaties may need, in addition to their coming into force in international law, internal promulgation. There is, further, in this country the important distinction between self-executing treaties and treaties requiring legislation.⁴ Finally, a treaty does not prevail over a later Federal statute.⁵

Naturally, even under such rules of municipal law, it must be the question of a true norm of international law, not, for instance, of recommendations by international organizations, a declaration which is not legally binding, a statement by the International Law Commission, or even clauses in treaties, where these clauses do not constitute legally binding norms, but merely ethical considerations or political programs for the future.⁶ The often voiced opinion that British Prize Courts are "courts of international law" is, of course, theoretically untenable. These courts are courts of His Britannic Majesty and are, as was fully recognized in the case of *The Zamora*, bound by a British Act of Parliament, even if it is not in conformity with international law. Municipal law can naturally go further, as the norms of the American and some European constitutions do. Under Swiss law the rules of international treaties to which Switzerland is a

Law of England?" (Grotius Society Transactions, Vol. 25, pp. 51-88); E. D. Dickinson in this JOURNAL, Vol. 26 (1932), pp. 239-260; Walz, *Völkerrecht und staatliches Recht* (1933); Oppenheim-Lauterpacht, *International Law*, Vol. I (7th ed., London, 1948), pp. 37-44.

² See the Earl of Mansfield in *Triquet v. Bath* (1764), 3 Barrows 1478; *Respublica v. DeLongchamps* (1784), 1 Dallas 111; Marshall, C. J., in *The Nereide* (1815), 9 Cranch 388; Lord Campbell, C. J., in *Magdalena Steam Navigation Co. v. Martin* (1859), 2 Ellis and Ellis 94; Turner, L. J., in *Emperor of Austria v. Day and Kossuth* (1861), Great Britain, High Court of Chancery, 2 Gilford 621; Lord Alverstone, C. J., in *West Rand Central Gold Mining Co. v. The King*, [1905] 2 K. B. 391.

³ Weimar Constitution, 1919, Art. 4; Austrian Constitutions, 1920, Art. 9, 1934, Art. 9; Spanish Constitution, 1931, Art. 9. See also the present so-called Bonn Constitution (*Grundgesetz*).

⁴ See Marshall, C. J., in *Foster and Elam v. Nellson* (1829), 2 Peters 253; *Robertson v. General Electric Co.* (1929), 32 F. (2d) 495.

⁵ See *Hooper v. U. S.* (1887), 22 Ct. Cl. 408.

⁶ That is why the decision in *Sei Fujii v. State of California* (Calif. Dist. Ct. App. 2nd Dist. April 24, 1950) is doubly attackable: The corresponding clauses of the United Nations Charter are not self-executory, nor do they constitute legally binding norms. See Manley O. Hudson in this JOURNAL, Vol. 44 (1950), pp. 542-548.

party prevail not only over cantonal law but even over *later* Swiss Federal laws which are in contradiction to international law.⁷

"The doctrine that international law is a part of the law of the land," writes Lauterpacht,⁸ "is a rule of law." That is correct insofar as this rule is a norm of *municipal* law; but it is not a norm of international law. The latter binds the states legally to execute and enforce rules of general and particular international law binding upon them. But it delegates to the sovereign states the competence to do so according to their discretion. They can enact such municipal law, but it is equally in conformity with international law if they choose to "transform"⁹ the norms of international law into municipal law in each single case.

Lauterpacht further states correctly that the maxim that international law is a part of the law of the land must not be confused with the issue of the supremacy of international law. But if he continues that one may assert the first, but deny the second proposition, we would rather emphasize exactly the contrary. International law does not bind the states to have a municipal law of the "part of the law of the land" type. But whether a state has such municipal law or not, the norms of international law are always and, by their very nature, intrinsically superior to municipal law. Whatever the municipal law of a state may be, violation of the superior norms of international law, whether by its legislative, administrative or judicial organs—even if the latter are under a legal duty to apply municipal law which is in contradiction to international law—always makes the state internationally responsible. It is of the greatest importance to distinguish clearly between a municipal norm of the "part of the law of the land type" and the clear supra-statal validity of international law, regardless of the contents of municipal law.¹⁰

The second theoretical error in the discussion, quoted at the beginning, is of an entirely different nature. In most discussions and treatments of "international law in national courts," certain decisions by the United States Supreme Court in conflicts between States of this Union are quoted simply as applications of international law.¹¹ The Supreme Court has,

⁷ Paul Guggenheim, *Lehrbuch des Völkerrechts* (Basel, 1948), Vol. I, pp. 34, 35.

⁸ In Oppenheim-Lauterpacht, *op. cit.*, Vol. I, p. 44.

⁹ H. Kelsen, "La transformation du droit international en droit interne," *Revue Générale de Droit International Public*, 1936, pp. 5 ff.

¹⁰ This distinction is now brought out with the utmost clarity by A. Verdross, *Völkerrecht* (Vienna, 1950), pp. 65-66.

¹¹ See Charles K. Burdick's paper "Decisions of National Tribunals" and discussion in Proceedings of the 5th Conference of Teachers of International Law and Related Subjects, Washington, 1933, pp. 162-166, 172 ff. See also the Digests of International Law by Moore and Hackworth, the treatise by Oppenheim-Lauterpacht. On the subject of international law in national courts, see in general: D. Anzilotti, *Il diritto internazionale nei giudizi interni* (1905); James Brown Scott, *Judicial Settlement of Controversies between States of the American Union* (1918); H. A. Smith, *The American Supreme Court as an International Tribunal* (1921); Ruth D. Masters, *International*

indeed, often applied rules of international law in controversies between States of this Union; the same has been done by the German *Staatsgerichtshof* in controversies between member States and by the Swiss Federal Tribunal in conflicts between the Cantons,¹² as, *e.g.*, in determining the mountain borderline between the Cantons of St. Gallen and Appenzell. Rules of international law have been applied here, in Germany and Switzerland, in controversies between member States, concerning bays,¹³ diversion of water and utilization of rivers and lakes,¹⁴ nuisances,¹⁵ river boundaries,¹⁶ problems of accretion and avulsion,¹⁷ jurisdiction,¹⁸ boundaries (prescription)¹⁹ navigation, state succession.²⁰ American cases abound.

But in order to gain a theoretically correct insight into this type of application of international law it is necessary first, to consider that the sovereign

Law in National Courts (1932). It seems also that Prof. Willard B. Cowles, in his 1950 lectures on the application of international law within federal states at the Hague Academy of International Law, taught that international law as such is applicable in the relations between non-sovereign parts of federal states, and even to provinces and municipalities.

¹² On Swiss cases see Guggenheim, *op. cit.*, Vol. I, p. 34, note 33.

¹³ See *Louisiana v. Mississippi*, 202 U. S. 1; *Michigan v. Wisconsin* (1926), 270 U. S. 295; *Wisconsin v. Michigan* (1935), 295 U. S. 455; decision of the German *Staatsgerichtshof* of July, 1928, in the controversy between Lübeck and Mecklenburg-Schwerin (Annual Digest 1927-28, case No. 88).

¹⁴ See *Kansas v. Colorado* (1907), 205 U. S. 46 (Arkansas River); *Wyoming v. Colorado* (1922), 259 U. S. 419, and (1936), 298 U. S. 573 (Laramie River); *Connecticut v. Massachusetts* (1931), 282 U. S. 660 (Ware and Swift Rivers); *New Jersey v. New York* (1931), 283 U. S. 336 (Delaware River); *Washington v. Oregon* (1936), 297 U. S. 517 (Walla Walla River); *Wisconsin v. Illinois* (1929), 273 U. S. 367, (1930), 281 U. S. 179, (1933), 289 U. S. 395 (diversion of the waters of Lake Michigan); decision of the German *Staatsgerichtshof* between Baden and Württemberg of June 19, 1927 (use of the Danube).

¹⁵ *Missouri v. Illinois* (1906), 200 U. S. 496; *New Jersey v. City of New York* (1931), 283 U. S. 473.

¹⁶ *Iowa v. Illinois* (1893), 147 U. S. 1; *Louisiana v. Mississippi* (1906), 202 U. S. 1; *Indiana v. Kentucky* (1890), 136 U. S. 479; *Nebraska v. Iowa* (1892), 143 U. S. 359; *Washington v. Oregon* (1908), 211 U. S. 127, and (1909), 214 U. S. 205; *Arkansas v. Tennessee* (1918), 246 U. S. 158; *Arkansas v. Mississippi* (1919), 250 U. S. 39; *Oklahoma v. Texas* (1920), 252 U. S. 372, and (1923), 260 U. S. 606; *Minnesota v. Wisconsin* (1920), 252 U. S. 273; *Georgia v. South Carolina* (1922), 257 U. S. 516; *New Mexico v. Texas* (1927), 275 U. S. 279; *Vermont v. New Hampshire* (1933), 289 U. S. 593; *New Jersey v. Delaware* (1934), 291 U. S. 361.

¹⁷ See *Nebraska v. Iowa* (1892), 143 U. S. 359; *Louisiana v. Mississippi* (1931), 282 U. S. 458; *Jraolo v. Province of Buenos Aires*, Supreme Court of Argentina (Annual Digest 1919-1922, case No. 62).

¹⁸ See *Central Railroad Co. v. Jersey City* (1908), 209 U. S. 473.

¹⁹ See *Rhode Island v. Massachusetts* (1838), 12 Peters 657; *Virginia v. Tennessee* (1893), 148 U. S. 503; *Louisiana v. Mississippi* (1906), 202 U. S. 1, and (1931), 282 U. S. 458; *Maryland v. West Virginia* (1910), 217 U. S. 1; *Arkansas v. Tennessee* (1918), 246 U. S. 158; *Arkansas v. Mississippi* (1919), 250 U. S. 39; *Michigan v. Wisconsin* (1926), 270 U. S. 295.

²⁰ *Virginia v. West Virginia* (1911), 220 U. S. 1; (1918), 246 U. S. 568.

states, although they are no longer the only persons in international law, are still the most important, permanent, and full persons in international law and, at the same time, its creators. In this sense, the Permanent Court of International Justice²¹ could say, although not absolutely correctly, that "international law governs relations between *independent* States." One must distinguish, in the terminology of this writer,²² between "States in the sense of international law" and "States in the sense of municipal law." Member States of a Federal State are, generally speaking, not states in the sense of international law,²³ although they may have a partial personality in international law, which is, naturally, derived from international, not from municipal, constitutional law.²⁴ But the member States of this Union, as well as the Cantons of Switzerland, are merely "States in the sense of municipal law," and not sovereign states.²⁵ This correct insight is often expressed in decisions of the United States Supreme Court.²⁶ The legal relations between the States of this Union or the Cantons of Switzerland do not belong to international, but to "interstate" or "intercantonal," *i.e.*, national law.

The norms of international law concerning international rivers apply, by the supremacy of international law, only to *international* rivers which flow through or form the boundary between two or more *independent* states. But the rivers involved in these interstate cases, like the Arkansas, Colorado, Laramie Rivers, are, unlike the Rio Grande, not international, but "inter-

²¹ In the *S. S. Lotus* Case, P.C.I.J., Series A, No. 10, Sept. 7, 1927, pp. 16, 18.

²² Josef L. Kunz, *Die Staatenverbindungen* (Stuttgart, 1929).

²³ They are not members of the international community; that is why the federal state alone is internationally responsible for them; that is why they enjoy no immunity in foreign courts (*State of Ceara* (a member State of Brazil) *v. Dorr*, France, *Cour de Cassation*, 1932, *Recueil Dalloz*, 1933, p. 196). The U. S. Supreme Court decision in *Monaco v. Mississippi* (1934), 292 U. S. 573, is based on American constitutional, not on international law.

²⁴ See now Byelorussia and the Ukraine. Treaties can, of course, confer a limited international personality even on a territorial entity which is not a state and is not independent and self-governing, such as the proposed Free Territory of Trieste (See Jos. L. Kunz in *The Western Political Quarterly*, Vol. I, No. 2 (1948), pp. 99-112).

²⁵ That they are often called "sovereign" means sovereignty in the sense of the Constitution of the United States, not sovereignty in the sense of international law.

²⁶ Thus, Justice Holmes, in *Missouri v. Illinois* (1905), distinguished between "international" and "interstate law." Justice Cardozo, in *New Jersey v. Delaware* (1934), said of the rule of the "thalweg" that "such considerations have less importance for states united under a general government than for States wholly independent." Justice Field, in *Iowa v. Illinois* (1893), spoke of the application in this interstate controversy "of the same rule when a navigable river constitutes the boundary between two *independent* States," and added that "the reasons and necessity of the rule of international law may not be as urgent in this country where neighboring States are under the same general government." In *New Jersey v. New York* (1931), the Court held: "*Different* considerations come in when we are dealing with *independent* sovereigns. . . . In a less degree, perhaps, the same is true of the *quasi-sovereignties* bound together in the Union" (*Italics supplied*).

state" rivers.²⁷ International law, of course, raises no objection to the application of international rules to interstate conflicts or to interstate rivers. In *Wisconsin v. Michigan* (1935) Justice Butler stated that "principles of international law apply also to boundaries between States constituting the United States." But it must be understood that, if they do, they apply by force of municipal, not international law. This legal situation fully justifies the fact that the United States Supreme Court in these cases sometimes applies rules which, as to their contents, are identical with the corresponding norms of international law, and sometimes does not, but applies common law, statutory law, local customary law, interstate agreements, long usage or acquiescence.²⁸ In *Iowa v. Illinois* (1893) Justice Field stated that the rules of international law "will be held to obtain, unless changed by statute or usage."

We must distinguish between what this writer, for purposes of theoretical clarification, would call *genuine* international law and international law *by analogy*. The application of international norms in these interstate cases is neither a duty imposed by international law, nor has it anything to do with the municipal "part of the law of the land" rule which envisages only *genuine* international law. It is purely a matter of municipal law to apply in such cases international law *by analogy*.²⁹

Such international law by analogy appears also in other fields. Genuine international law binds the states to grant to diplomatic agents the immunities prescribed by international rules. But the states are free to grant the same privileges *by analogy* to inter-imperial delegates who are *not* diplomatic agents in the sense of international law.³⁰

The two theoretical clarifications here given—distinction between the municipal character of the "part of the law of the land" rule and the always existing supremacy of international law on the one hand, and the

²⁷ Thus, Justice Van Devanter, in *Wyoming v. Colorado* (1922), spoke of the Laramie River correctly as an "interstate stream."

²⁸ It depends on the case. In *Wyoming v. Colorado* (1922), not international law, but the local "doctrine of appropriation," shared by both States, was applied. But see *Kansas v. Colorado* (1907), where Colorado had the appropriation, but Kansas the common law system; or *Connecticut v. Massachusetts* (1937), where both States had the common law system. See also the "Colorado River Compact" of 1922. In *Central Railroad Co. v. Jersey City* (1908) Justice Holmes applied no international law, but an agreement and statutory law.

²⁹ Guggenheim (*op. cit.*, Vol. I, p. 344, note 38) correctly states that the Swiss Federal Tribunal applies to intercantonal cases international law "*in analoger Weise*."

³⁰ "Representatives which Great Britain and the Dominions send to one another as High Commissioners do not enjoy diplomatic status" (Oppenheim-Lauterpacht, *op. cit.*, Vol. I, p. 692). But "the Finance Acts of 1923 and 1928 confer upon High Commissioners of the Dominions and India . . . the same immunity from income tax, super tax and land tax as is enjoyed by the accredited ministers of a foreign State" (*idem*, note 5, pp. 692-693).

distinction between genuine international law and international law by analogy, on the other—are by no means, as some would believe, a consequence of the theoretical construction known as the “dualistic doctrine.” The latter is certainly untenable, because it is unable to construe positive international law as superior to national law. Only the monistic doctrine of the supremacy of international law is correct, for the sole reason that it alone is able to furnish a construction in conformity with the positive international law actually in force. But it is a theoretical construction of positive international law, not an *a priori* natural law hypothesis, out of which rules of positive international law could be gained by mere logical deduction. What the rules of positive international law at a given time are, can only be found by its analysis.

Such analysis clearly shows that present-day positive international law does not prescribe that the states must have a “part of the law of the land” norm—although such municipal norm is welcome, convenient and beneficial; on the other hand, international law is always, and regardless of the contents of municipal law, superior to the national legal orders. Such analysis further shows that, like every legal rule, the rules of international law have a certain temporal, personal, territorial and material sphere of validity; they are binding upon the sovereign states and superior to national law. The sovereign states may also apply international law rules beyond their spheres of validity. But this is a matter of municipal law. If the states do so, they do not apply genuine international law, but apply international law merely by analogy.

JOSEF L. KUNZ

THE FOURTH MEETING OF CONSULTATION OF MINISTERS OF FOREIGN AFFAIRS

The outstanding characteristic of the Union of American Republics, now provisionally designated as the Organization of American States, is that it has developed by slow stages, widening step by step the scope of its activities and adjusting its organization to the needs of the conditions presented. For more than a half-century the “International Union,” established in 1890 along the lines of the Universal Postal Union and other similar groups created for a specific purpose, pursued its objectives on the basis of successive resolutions of inter-American conferences without the need of resorting to formal treaty obligations. An effort was made in 1928, at Habana, to establish the Union upon more strictly legal foundations, but the failure of the American States to ratify the convention did not in any way impede the functioning of the existing system. Only in 1948 were the relations of the American States reduced to the terms of a formal Charter, which is still only in effect provisionally by virtue of a resolution of the Bogotá Conference.¹

¹ Ten states have now (March 16) deposited their ratifications of the Charter, four more being needed to meet the requirement of two-thirds.

What place does the Meeting of Consultation hold in the constitutional system of the Organization of American States, if so strong a word as "constitutional" can be used of the Charter adopted at Bogotá? Common consultation as a means of meeting imminent threats to the peace dates only as far back at 1936. Clouds of war had begun to hang over Europe, and the United States felt that it was urgent to extend the new "Good Neighbor" policy into the field of continental defense. The Monroe Doctrine was there, but it called for no coöperation on the part of the other American States; indeed, in the terms in which it had been stated by Secretary Hughes in 1923, it had the effect rather of deterring coöperation than promoting it. Could the American States be made partners, entrusted equally with the obligation to defend America in the event of a European war?

The convention adopted at Buenos Aires was loosely drafted, the terms being broad enough not to alienate the support of certain states whose traditional antipathy to the Monroe Doctrine was so strong that they could not bring themselves to use language that suggested the Doctrine too closely. The agreement merely provided that, in the event of a menace to the peace of America, the American Governments would consult with one another individually to decide whether there should be common consultation to find and adopt methods of pacific coöperation. The principle of regional collective security was thus recognized, but the steps to be taken were deliberately left undetermined.

When the Eighth International Conference of American States met at Lima in 1938 the clouds of war in Europe had become much darker, but it took the most untiring negotiations to clarify the principle proclaimed at Buenos Aires and to provide a procedure equal to the emergency that might arise. This was done by the famous Declaration of Lima, which provided that the consultations which were to take place in the event of a threat to the peace should be in the form of a meeting of the Ministers of Foreign Affairs of the American Republics, to meet in their several capitals and without protocolary character. Here was a body that might be summoned in an emergency and, under the circumstances of modern travel, might be brought together in as short a time as the situation might require.

The First Meeting of Consultation, held at Panama within a few weeks of the outbreak of war in 1939, was concerned with measures to maintain the neutrality of the American States, adopting for that purpose common standards of conduct and marking off a security zone to be kept free from hostile acts by the belligerents. The Second Meeting, held at Habana in 1940, renewed in more explicit terms the principle of collective security set forth in the Convention of Buenos Aires and in the Declaration of Lima, making at the same time more specific provision for resistance to any transfer of sovereignty over colonies of non-American countries from one

belligerent to the other. This took no little courage, seeing that in July, 1940, it looked as if Germany had practically won the war. The Third Meeting of Foreign Ministers, held in Rio de Janeiro in January, 1942, following the attack by Japan upon the United States at Pearl Harbor, affirmed the principle of regional collective security in even stronger terms than before and agreed upon specific political and economic measures of coöperation to be taken for the defense of the Western Hemisphere.

The Meeting of Consultation had now obtained a firm footing in the inter-American system. Three years later, at the Conference held at Mexico City in 1945, provision was made for annual meetings held upon special call by the Governing Board of the Pan American Union and charged with decisions upon urgent matters. Two years later, at Rio de Janeiro in 1947, the Treaty of Reciprocal Assistance, which now supplants all previous pledges of regional collective security, made provision for emergency meetings of what is called "the Organ of Consultation" and specified that the consultations to which the treaty referred were to be carried out "by means of Meetings of Ministers of Foreign Affairs of the American Republics which have ratified the Treaty," decisions being taken by a vote of two-thirds of the states which have ratified the treaty. This emergency character of the Meeting of Consultation is preserved in the Charter of the Organization of American States, now in force provisionally, Article 39 of which provides that the Meeting of Consultation shall be held "in order to consider problems of an urgent nature and of common interest to the American States," as well as to serve as the "Organ of Consultation" for which the Rio Treaty of Reciprocal Assistance provides.

On December 18, 1950, the representative of the United States on the Council of the Organization of American States, requested the Council to consider the calling of a Meeting of Consultation under the terms of Article 39 of the Charter. The circumstances set forth in the request, namely, "the aggressive policy of international Communism" which, carried out through its satellites, has brought about "a situation in which the entire free world is threatened," might, perhaps, have equally justified a meeting of the Organ of Consultation provided for in the Treaty of Reciprocal Assistance. But there were advantages in not raising the question of the degree to which, under the somewhat complex terms of Article 6 of the Rio Treaty, "the inviolability or the integrity of the territory or the sovereignty or political independence of any American State" might be affected by the circumstances referred to in the request of the representative of the United States on the Council. Hence the request was made on the basis of the broader terms of Article 39 of the Charter. Reference to the Charter has the further advantage of giving representation to Guatemala, whose ratification of the Rio Treaty is now pending. At the same time the voting procedure under the Charter is sufficiently elastic to permit the decision of

"procedural matters" by less than the two-thirds majority which the terms of the Rio Treaty might appear to require.

The program of the Fourth Meeting of Consultation has been fixed as follows, as approved by the Council of the Organization:

- I. Political and military coöperation for the defense of the Americas, and to prevent and repel aggression, in accordance with inter-American agreements and with the Charter of the United Nations and the resolutions of that organization.
- II. Strengthening of the internal security of the American Republics.
- III. Emergency economic coöperation:
 - (a) Production and distribution for defense purposes.
 - (b) Production and distribution of products in short supply and utilization of necessary services to meet the requirements of the internal economies of the American Republics; and measures to facilitate insofar as possible the carrying out of programs of economic development.²

CHARLES G. FENWICK

JURISDICTION OVER THE SEA BED AND SUBSOIL BEYOND TERRITORIAL WATERS

A noteworthy *Memorandum on the Regime of the High Seas* prepared by the United Nations Secretariat for the International Law Commission¹ suggests that the problem of reconciling the freedom of the seas with disciplined exploitation of the resources of the high seas and its subsoil

does not appear insoluble provided the extension of the jurisdiction of littoral States to the high seas in the vicinity of their coasts does not develop into a territorial jurisdiction, similar to the rights of sovereignty formerly claimed over the high seas, but is confined to a special jurisdiction over one or more of the natural elements distinguishable in the high seas: the stratosphere or atmospheric area, the surface of the sea, the sea depths, the bed and the marine sub-soil.²

Stressing the "essentially negative" nature of the doctrine of the freedom of the seas as a reaction against claims to sovereignty over the high seas, the *Memorandum* points out that, although the rule of non-interference with foreign-flag vessels on the high seas has assured freedom of navigation, it does not provide a regime for the utilization of the high seas as a source of wealth, since it fails to prescribe means for conserving the resources of the sea or to proscribe acts *contra bonos mores*. The inadequacy of the rule of non-interference is seen when it is used to justify acts imperiling the conservation of limited resources such as fisheries or the disciplined exploitation of submarine resources of untold value.

² For further details of the Meeting, see *Organization of American States, Fourth Meeting of Consultation of Ministers of Foreign Affairs, Washington, D. C. March 26, 1951: Handbook*.

¹ U.N. Doc. A/CN.4/32, July 14, 1950, pp. vi, 112.

² *Ibid.*, p. 15.

With particular reference to the sea bed and its subsoil, the problem is one of establishing a legal regime which, while safeguarding the use of the high seas as a means of communication, furthers the regulated exploitation of its submarine resources. Efforts to derive a theory as to the legal status of the sea bed from traditional concepts of the high seas as *res communis* or as *res nullius* are of little practical value.³ If the sea bed is to be regarded as *res communis*, practical problems arise of persuading states to abandon recently asserted claims to jurisdiction, control or sovereignty,⁴ and of reaching international agreement for the common exploitation of its resources. If the sea bed is to be regarded as *res nullius*, the conclusion might follow that title depended upon effective occupation or exploitation. It might, as Jonkheer P. R. Feith has observed, "allow such countries as have reached the highest technical progress to take possession of areas where—to put it bluntly—they have no business." It might mean

that America could, without the consent of the United Kingdom, explore the continental-shelf region around Great Britain outside the 3-mile zone and could start the exploitation of that region if valuable minerals were found. Russia might consider it necessary to occupy the continental shelf [*sic*] of the Persian Gulf . . . while Swiss geologists might insist on Switzerland occupying the shelf area of Australia.

To avoid reversion to "the law of the jungle" Jonkheer Feith suggests "general recognition by international law of the principle that the continental shelf belongs to the coastal state."⁵

In its preliminary discussions on the Regime of the High Seas, the United Nations International Law Commission distinguished problems of jurisdiction over the surface of the high seas and control of its fishery resources from jurisdiction and control over the resources of the sea bed and subsoil,⁶ but apparently saw no compelling reasons for distinguishing the legal status of the sea bed from that of the marine subsoil.⁷ The views of the Commission on the legal status of the sea bed and subsoil are indicated by its replies to questions posed by Judge Manley O. Hudson:

Is the submarine area (sea-bed and subsoil) of the continental shelf off the coast of a littoral state and outside the area of its territorial waters

(1) *res nullius*?

(2) *res communis*?

³ *Ibid.*, pp. 10 ff.

⁴ *Ibid.*, pp. 59 ff.; Richard Young, "Recent Developments with Respect to the Continental Shelf," this JOURNAL, Vol. 42 (1948), pp. 849-857, and *ibid.*, Vol. 43 (1949), pp. 530-532, 790-792; see also *supra*, p. 225.

⁵ P. R. Feith, "Rights to the Sea Bed and Its Subsoil," International Law Association, Report of the 43rd Conference, Brussels, 1948, pp. 168, 170, 173, 183 ff.

⁶ See International Law Commission, 2nd Session, Summary Records, U.N. Doc. A/CN.4/SR. 66-69, July, 1950; J. P. A. François, Report on the High Seas, U.N. Doc. A/CN.4/17, March 17, 1950.

⁷ U.N. Doc. A/CN.4/SR. 66, July 12, 1950, pp. 18 ff. Cf. Feith, *loc. cit.*, pp. 184 ff.

(3) subject *ipso jure* to the control and jurisdiction of the littoral state? or

(4) subject to the exercise of control and jurisdiction by the littoral state for the limited purpose of exploring and exploiting the natural resources?⁸

The Commission unanimously rejected concepts of the sea bed and subsoil as *res nullius* or as *res communis*.⁹ The question whether the littoral state had jurisdiction *ipso jure*, i.e., without formally claiming such rights, or merely in cases where it asserted or actually exercised control, was debated both before and after the Commission, by a vote of 6 to 4, gave an affirmative answer to Judge Hudson's third question. Judge Hudson, regretting the failure of the Commission to answer affirmatively his fourth question, "said that the Commission's vote meant that the right to explore and exploit did not depend on any claim to that right by a littoral state; yet the right should be conditional upon such a claim." Although states had jurisdiction over their territorial waters *ipso jure*, he questioned the desirability of recognizing that states had the rights of control and jurisdiction *ipso jure* over the continental shelf.¹⁰

Attempts to determine the legal status of submarine areas in terms of a "continental shelf" theory have encountered difficulties of a geographical and geological nature. Differing physical characteristics such as depth, slope, extent and the presence of submarine valleys suggest that the jurist has available no automatically applicable definition of a continental shelf. Moreover, areas like the Persian Gulf, the Sicilo-Tunisian plateau, the Northern Adriatic or the Aegean Seas, while not "continental shelves" according to the geographers, are shallow waters reputedly rich in oil or other natural resources and border states from which efforts may be made to extract submarine resources.¹¹

It was considerations of this nature which led the International Law Commission to abandon attempts to define the legal status of submarine areas in terms of a continental shelf theory and to approve tentatively the following principles:

1. Control and jurisdiction over the sea-bed and subsoil of submarine areas outside the marginal sea may be exercised by a littoral state for the exploration and exploitation of the natural resources therein contained. *The area for such control and jurisdiction will need definition but need not depend on the existence of a continental shelf.*¹²

⁸ U.N. Doc. A/CN.4/SR. 68, July 14, 1950, p. 9.

⁹ *Ibid.*, p. 13.

¹⁰ *Ibid.*, pp. 13 ff.

¹¹ U.N. Doc. A/CN.4/32, pp. 102 ff.

¹² U.N. Doc. A/CN.4/SR. 67, July 13, 1950, pp. 7-24. The first sentence was adopted by a vote of 10 to 1. The italicized sentence was adopted by a vote of 6 to 4, with 2 abstentions, as a substitute for Judge Hudson's original proposal which had read: "... therein contained, to the extent to which such exploitation is feasible."

2. Such control and such jurisdiction should not substantially affect the right of free navigation of the waters above such submarine areas nor the right of free fishing in such waters.¹³

While it should be borne in mind that the principles were adopted, not as formal proposals or as a final text, but as general directives to the *Rapporteur*, M. François, it is interesting to note the significance of the principles so far accepted by the Commission.

(1) Unanimous endorsement was given to the principle that the problem of the legal status of the sea bed and subsoil was distinct from problems of jurisdiction over a contiguous zone of the high seas for customs purposes or for controlling navigation or high seas fisheries.

(2) It was likewise unanimously agreed that the exercise of control and jurisdiction over submarine areas should not substantially affect free navigation or fisheries.

(3) Of great significance is the overwhelming endorsement of the principle that the littoral state has a legal right to exercise control and jurisdiction over the adjacent sea bed and subsoil for purposes of exploration and exploitation. Alternatives which would have branded as illegal—i.e., as violations of existing international law—such extensions of jurisdiction by littoral states because the high seas belonged to all or because their resources could only be developed by international agreement were unanimously rejected. No lamentations over “the inequalities of geography” prevented the Commission, by a similar vote, from rejecting the concept of the sea bed as *res nullius* with a consequent license to all to engage in predatory competition for the exploitation of submarine resources off foreign coasts.

(4) There was general agreement in the International Law Commission that the area of control and jurisdiction by the littoral state for the exploitation of submarine resources must be limited. Judge Hudson's tentative proposal that such control and jurisdiction be limited only by the feasibility of exploitation did not find favor with the Commission. There was some support for limiting the area of control to the continental shelf, particularly in view of the recent proclamations of certain states and of the logic of regarding the continental shelf “as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it” and of regarding its resources as “a seaward extension of a pool or deposit lying within the territory.”¹⁴ However, the belief that the problem of exploiting submarine resources was not limited by the existence of a continental shelf led a majority of those voting to reject this particular criterion of limitation. Whether, where a continental shelf exists, it does not serve as a better criterion of limitation upon the area of control and jurisdiction

¹³ *Ibid.*, pp. 24–26. Adopted by a vote of 9 to 0.

¹⁴ United States, Proclamation with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Sept. 28, 1945, 10 Fed. Reg. 12303.

than a limitation expressed in terms of miles, should be re-examined by the Commission. In areas where no continental shelf exists—as in the Persian Gulf—it would seem possible to suggest limitation by international agreement—as in the British-Venezuelan agreement of February 26, 1942, relating to the submarine areas of the Gulf of Paria¹⁵—or, perhaps provisionally, in terms of miles.

(5) Finally, there was sharp divergence of opinion in the Commission over the question whether the sea bed and subsoil vested *ipso jure* in the littoral state or whether title needed to be based upon a claim thereto or, perhaps, the actual exercise of control. The Commission has unanimously endorsed the principle that the littoral state may exercise certain jurisdictional rights over the adjacent submarine areas. What is the legal situation where a state because of negligence or lack of technological facilities fails to claim or exercise its recognized rights therein? Would those areas off its coasts be *res nullius*—a concept which the Commission decidedly rejected as undesirable? If a foreign state, without agreement with the littoral state, undertook expensive operations to exploit the resources, would they be “legal” until the littoral state objected? Would the littoral state be held to have lost its right of exploitation in those areas? The logic of the principles unanimously endorsed by the Commission suggests the desirability of regarding the submarine areas as vesting *ipso jure* in the littoral state rather than as a “right” which is unperfected until formally claimed or exercised.

Two objections may be raised to this thesis: The first—that the adoption of such a position would render proclamations such as those of President Truman unnecessary—may be accepted as true for the future, although at the time of the proclamation the legal situation was perhaps less clear than it will be if the proposals in process of formulation by the International Law Commission receive general acquiescence. The second objection—that the failure or inability of a littoral state to develop its natural resources would interfere with “the best possible utilization” of the resources of the sea bed—might also be admitted, although no comparable obligation rests upon states to exploit their land resources for the common benefit. The feasibility of developing submarine resources by international agreement can be re-examined from time to time as political conditions warrant. The positions so far assumed by the International Law Commission seem to accord with political realities and seem to provide a promising approach to a regulated utilization of the resources of the sea bed and subsoil. Problems of limits and of safeguarding the utilization of the high seas for communications and fisheries should not prove too difficult to work out in the near future.

HERBERT W. BRIGGS

¹⁵ Cf. U.N. Doc. A/CN.4/32, pp. 57 ff.; F. A. Vallat, “The Continental Shelf,” *British Year Book of International Law*, Vol. 23 (1946), pp. 333-338.

CURRENT NOTES

FORTY-FIFTH ANNUAL MEETING OF THE SOCIETY

The Forty-Fifth Annual Meeting of the Society, which opens at the Hotel Washington in Washington, D. C., on Thursday, April 26, 1951, has as its general theme the position of the United States in world affairs, with special reference to international conventions. The subjects included in the advance program are as follows:

PROGRAM

Thursday, April 26, 1951, 10:00 a.m.

Meeting of the Executive Council

Thursday, April 26, 1951, 2:30 p.m.

Constitutional Issues Raised by the Position of the United States in World Affairs

- (a) Powers of the Executive
- (b) Powers of Congress
- (c) Executive Agreements

Thursday, April 26, 1951, 8:15 p.m.

Address by *Manley O. Hudson, President of the Society*
(Second speaker to be announced)

Friday, April 27, 1951, 10:00 a.m.

Legal Effect of Treaties in Municipal Law

- (a) Incorporation in national law—Suggested amendment of United States Constitution
- (b) Self-executing *v.* non-self-executing provisions
- (c) Special position of Federal States
- (d) Later legislation inconsistent with treaty provisions

Friday, April 27, 1951, 2:30 p.m.

Particular Problems concerning Incorporation of Treaty Provisions

- (a) Genocide Convention
- (b) Proposed Covenant on Human Rights
- (c) Proposed Convention on Freedom of Information

- (d) European Convention for Protection of Human Rights and Fundamental Freedoms

Report of Committee on Study of Legal Problems of the United Nations

Friday, April 27, 1951, 8:00 p.m.

Sanctions under the United Nations Charter

- (a) United Nations action in defense of Korea
- (b) Potential defense of Europe

Saturday, April 28, 1951, 10:00 a.m.

Business meeting of the Society

11:00 a.m.

Meeting to organize as corporation

Election of officers

Meeting of the Executive Council

Saturday, April 28, 1951, 7:30 p.m.

Annual dinner—President Manley O. Hudson, presiding

The names of the speakers appear in the final program of the meeting.

ELEANOR H. FINCH
Executive Secretary

THE INSTITUTE OF INTERNATIONAL LAW AT BATH, 1950

To portray the Institute of International Law as it assembled at Bath in September, 1950, is a congenial task; for it was a many-sided gathering of friendly people eager to advance the cause of international law in harmony with the statutes of the organization, and eager also to make the most of their contacts with each other in the most agreeable way. It was a session of play as well as of work; and one wonders which element exerted the greater influence on the minds of the participants.

The Municipality of Bath placed its sumptuous Guildhall at the disposal of the Institute and so afforded a local habitat that revealed English hospitality at its best. That hospitality was again charmingly exemplified in feminine fashion by the radiant Mayor in the person of Councillor Miss Kathleen Harper (addressed as Mr. Mayor) who in formal fashion and wearing the regalia of her office formally welcomed the Institute to Bath on September fifth. After a sherry party, which she and her sister tendered the Institute at the Guildhall on the evening of September 8th, and after another which she and other ladies gave at her country home on September 10th, the representatives of the Institute, with the ladies who accompanied them, felt strangely cheered and almost ready to acclaim Bath as the inter-

national capital of the world and as a permanent abiding place of their organization.

On September 5th, the Institute unanimously elected to honorary membership Mr. Max Huber and Sir Cecil Hurst, and would have paid like tribute to Mr. Dionysio Anzilotti, had not his greatly lamented death occurred in August. Of this grievous fact the organization paid due tribute.

To quote a recent report by the Secretary General:

51 Confrères, 31 members and 20 associates representing 21 nations were present.¹ We felt great regret in the absence of others of our most faithful members prevented at the last moment from attending. Such was notably the case of two of our former presidents, Sir Cecil Hurst and Mr. Charles De Visscher. We noted the presence of 4 Confrères from the New World: Messrs. Hudson and Hyde (United States), Matos (Guatemala) and Valladão (Brazil).²

Conformably with the statutes, we proceeded in the course of the first administrative meeting to the election of two new Vice-Presidents, Mr. Hyde designated as 2nd Vice-President, and Mr. Donnedieu de Vabres as 3rd Vice-President. At this meeting Mr. Wehberg was elected Secretary-General to take the place of Mr. Fernand de Visscher, to whom the assemblage gave unanimous assurance of its warmest thanks for the great services which he had rendered the Institute.³

The following associates were elected to full membership: Sir Eric Beckett, and Messrs. Makarov, Matos, Pusta, Ripert, Sperl and von Verdross. Seventeen new associates were elected in the persons of Baron van Asbeck of The Netherlands, Mr. Plinio Bolla of Switzerland, Mr. Erik Castrén of Helsinki, Mr. Geoffrey Chevalier Cheshire, of Oxford, Mr. Constantine John Colombos of London, Mr. George A. Finch of Washington, D. C., Mr. Edvard Hambro of Norway, Mr. Paul Geouffre de La Pradelle of France, Mr. Yuen-li Liang, Director of the Division of Development and Codification of International Law, Legal Department of the United Nations, Mr. Antonio de Luna Garcia of Madrid, Mr. Gaetano Morelli of Rome, Mr. Alf Ross of Copenhagen, Mr. Emil Sandström of Stockholm, Mr. Walter Schätzel of Mayence, Mr. Jean Spiropoulos of Athens, Mr. Claude Humphrey Meredith Waldo of Oxford, and Mr. Wilhelm Wengler of Berlin.

An inspiring and cheering feature of the session at Bath was the heartening presence of some of our older colleagues who for many years had done yeoman service for the organization and who were happily still eager to help it on. Among them should be noted Mr. A. de La Pradelle, associated with the Institute since 1904, Mr. Vallotton d'Erlach since 1912, Mr. E. Lemonon and likewise Dr. Hans Wehberg since 1921, and Mr. A. Rolin

¹ At the Session of the Institute at Brussels in 1948, 27 members and 10 associates were in attendance. See *Annuaire*, 1948, p. 106.

² The French attendants at Bath were the most numerous from any single country, being 9 in number.

³ The Secretary General's Report to his colleagues was under date of Oct. 26, 1950.

since 1924. Moreover, the presence of Dr. Basdevant, President of the International Court of Justice, and connected with the Institute since 1921, was a stimulating influence. It is the habit of clubs in America to point to the roster of their membership as proof of their worthwhileness. So possibly a member of the Institute of International Law may be excused if in these solemn pages he yields to the temptation to rejoice in his eminent colleagues with whom he has the honor to be associated in labors for a great cause.

The success of the session at Bath was greatly facilitated by the Institute's able secretariat in the persons of Messrs. Michael Kerr, Jean-Flavien Lalive, Claude Mercier, Paul de Visscher, and Paul Bertoud.

The President of the Institute, Sir Arnold D. McNair, in his stirring inaugural address, vigorously besought his colleagues to grapple with the new and fresh problems of law confronting the international society, and to make it increasingly the means of showing how they should be dealt with and solved. It may here be observed that President McNair, with a skill and charm all his own, presided as chairman with a grace and unceasing consideration that made all feel his fitness for his post and the wisdom of the Institute in choosing him to fill it. He was ably seconded by Mr. Henri Rolin, the first Vice President, who, as a constantly utilized presiding officer, fulfilled the function with impartiality and complete success. His labors were warmly appreciated by the organization. Nor need it be added that the election of Dr. Hans Wehberg as permanent Secretary General brought liveliest satisfaction to all concerned.

Turning to the achievements of the session at Bath, it may be observed that while the program contemplated the consideration of numerous topics, there proved to be lack of time for the discussion or full consideration of some of them by the organization as a whole. Thus discussions on merely three subjects, consuming all of its available time, were productive of the resolutions which were adopted.⁴ Those resolutions dealt with Asylum in

⁴ Yet the following statement from the Secretary General in his Report of Oct. 26, 1950, should be noted: "It was impossible, chiefly because of time, to discuss generally as one would have wished, other reports, for example that of our eminent colleague M. de La Pradelle on The International Effects of Nationalization. But the Bureau did not show itself indifferent towards the desires of many of the rapporteurs and of members of Commissions to have their reports discussed. It convoked two enlarged commissions, that is to say, permitting all the confrères, even those who were not members of the Commission in question, to take part in this work. And so the Commissions of Mr. Lauterpacht on The Interpretation of Treaties and of Mr. Rousseau on The Determination of Affairs Essentially Relevant to the National Competence of States, each had an evening meeting, and the rapporteurs noted some very interesting suggestions on the part of the participants. Other Commissions, such as that of Mr. Makarov on The Change of Territories and their Effects on Particular Laws, and those of Messrs. Batiffol and Valladão on The Consequences of the Difference of Nationality of Spouses on the Effects of Marriage and the Conditions of Divorce had meetings convoked by the rapporteurs, but participation was confined to the membership of the Commission present.

International Law (excluding neutral asylum), from the Fifth Commission under the leadership of Mr. Tomaso Perassi; Extraterritorial Scope of Foreign Penal Judgments, from the Seventh Commission under the leadership of Mr. Donnedieu de Vabres; and lastly, Conditions for the Granting of International Status to Associations Established by Private Initiative, from the Sixteenth Commission under the leadership of Mme. Bastid.

Inasmuch as we are blessed with an English translation of the three Resolutions, prepared by Sir Arnold McNair, it is reproduced below,⁵ thus enabling the reader to judge for himself how far the work of the session at Bath measured up to the needs of the present day. The texts of the three Resolutions deserve the careful study of all who profess an interest in international law.

While this brief offering is designed to be a report rather than a preaching, it is not out of place to observe that in view of certain statements emanating from the International Court of Justice pertaining to the interpretation of treaties,⁶ it behooves the Institute of International Law to grapple with the whole matter of the interpretation of treaties as a major task, and under the invaluable leadership of Professor Lauterpacht to present a critical and impartial study of what the relevant law really is.

At the last meeting of the session on September 12, 1950, the Institute elected Mr. Tomaso Perassi as President and Mr. Fernand de Visscher as First Vice President. Both were elected enthusiastically and unanimously. The next meeting of the Institute will be held in Italy, and probably in the spring of 1952.

CHARLES CHENEY HYDE

SOME SOVIET COMMENTS ON INTERNATIONAL LAW

The leading Soviet law review, *Sovietskoe Gosudarstvo i Pravo* (Soviet State and Law), frequently carries in its monthly issues various opinions concerning international law. Those views are of importance for two major reasons: first, because the Soviet lawyers may not express views at variance with the Party line which is also state policy; secondly, because it is of vital interest to the Western nations to know the opinions of a state which has assumed the leading position not only in respect to its 200 million citizens, but also in regard to some 80 millions of the Eastern European satellite countries and some 450 million Chinese.

The attitude which a Soviet lawyer is expected to take in regard to problems of international law was defined very clearly at the discussion meeting

And so the Session at Bath not only permitted the adoption of resolutions on 3 reports, but it also furnished the occasions on which there were very fruitful exchanges of ideas on other questions."

⁵ Supplement to this JOURNAL, p. 15.

⁶ See Advisory Opinion of March 3, 1950, concerning Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Reports, 1950, p. 8.

of the Theory of State and Law section of the Academy of Social Sciences, which was held on April 20, 1950, reported in *Sovietskoe Gosudarstvo i Pravo*, July, 1950, No. 7. The Academy itself is attached to the Central Committee of the Party and is designed to reflect the Party line among Soviet lawyers. The main speaker at that meeting, Dr. B. S. Mankovsky, severely criticized Professor E. A. Korovin for his book, *Short Course of International Law*, taking as an example of Korovin's deviations the latter's views on partisan (guerrilla) war. The subject of the criticism is interesting in itself in view of some practical problems which face the Western nations in the Far East.

Professor Korovin dealt in his book, among others, with the problem of the legitimacy of Soviet partisan action against the German occupying authorities during the last war. Article 2 of Hague Convention IV guarantees to the inhabitants of a belligerent country the right to be treated as belligerents, if they take arms *on the approach of the enemy*, and if they carry arms openly and respect the laws and customs of war. The Convention does not mention expressly the armed action of the civilian population in a territory *actually* occupied by the enemy, but its Article 43 authorizes the occupant to assure public order and safety in the occupied territory, this right and duty of the occupying Power being hardly reconcilable with armed action of the civilians under its authority. Professor Korovin acknowledged this view:

The peaceful population of a territory already occupied by enemy troops has no right of insurrection, and the belligerent may suppress the resistance of that population, punishing guilty persons according to the rules of criminal repression. (p. 37.)

In order to avoid the conclusion that the Soviet partisans could have been treated by the German authorities as common criminals, he established the distinction between an effective and a non-effective occupation, denying that the German occupation of the Soviet territories was effective.

Professor Korovin aroused the wrath of his colleagues. They rejected his contention that the German occupation was non-effective, because this interpretation would "reflect on the courage and heroism of the Soviet partisans who waged war against an enemy armed to his teeth, precisely in the conditions of the enemy occupation and under the most cruel terror." Moreover, Professor Korovin could have cast a doubt on Stalin's order which called on

. . . the occupied by the enemy districts . . . to organize partisan detachments . . . In the conquered districts one must create conditions unbearable for the enemy and all his assistants, persecute and destroy him at every step, and undermine all his measures.

What should a Soviet lawyer do when he comes to the conclusion that international law forbids certain acts, while this conclusion is harmful to the interests of the Fatherland?

What should a Soviet learned man and patriot do who has come to this conclusion and is convinced as to the correctness of his thesis? The answer is self-evident: he must disclose the reactionary nature of such a thesis and brand it in his work.

According to his critic, Professor Korovin was wrong in his interpretation of the Hague Convention. Dr. Mankovsky declared:

However, a much more serious error of comrade Korovin consists in the fact that, after having come to these conclusions, he approached objectively the appraisal of such phenomena which, even in his opinion, might be used against the Soviet patriots, and against the forces of socialism and democracy. . . . The "theory" of Professor Korovin concerning the legal status of the partisans is the expression of the bourgeois dogmatism whose counter-part is cosmopolitanism.

Should Professor Korovin have declared that, because of the interests of Soviet patriots, the Hague Convention authorized any partisan war as acts of hostilities committed by regular belligerents? This might have been inconvenient too, especially because the Soviet troops occupy and may occupy enemy territory. His critic reminded him of the fundamental distinction which should be made:

Professor Korovin has come to his conclusions, because he analyzed the problems of the partisan war without bearing in mind the Leninist-Stalinist teachings concerning just and unjust wars. . . . This is why the task of Soviet lawyers consists in giving a learned justification of the legality of partisan wars on territories occupied by the imperialist aggressors, having in mind the Leninist-Stalinist teachings on just and unjust wars.

One may add as a practical comment that every Soviet war according to those teachings is just and every "capitalist" war is unjust, and that the United Nations troops in the Far East are branded as gangs of imperialist aggressors by the Soviet press. This sample of Soviet legal thinking shows that in their mind international law may be interpreted in two senses: in one for the Soviet Union and its friends, in an opposite one in respect to the Western "imperialist aggressors."

Two other issues of the same review (Nos. 5 and 6) carry two contradictory appreciations of the work of the International Court of Justice. Issue No. 5 (May, 1950) publishes an article by the same Professor Korovin under a title which is fairly adequate to suggest the content: "The International Court in the service of English-American imperialism"; while the next issue, No. 6 (June, 1950), contains a very flattering appreciation by S. Borisov of an advisory opinion of the same Court which, insofar as that opinion was concerned, suddenly ceased to be a tool of English-American imperialism. The first article deals with the Advisory Opinion of March 30, 1950, concerning Human Rights in Bulgaria, Hungary and Rumania. The Advisory Opinion was, according to this article, "as much illegal, as it

was morally disgraceful." The resolution of the General Assembly requesting the advisory opinion was adopted by the "voting machine" which "never refuses to work" according to the wishes of the "English-American imperialists." The Soviet delegates did their best before the General Assembly:

The Soviet delegates, opposing the resolution proposed by the English-American bloc, disclosed the dirty concoctions of its representatives (Makin, Shawcross) who did not hesitate openly to pervert facts and grossly to falsify documents. . . . The adoption of the resolution by the Assembly and the affirmative answer of the Court were a new act of scandalous lawlessness on the part of the English-American bloc which reigns in the U.N.

Reminding the reader of the refusal of the Permanent Court of International Justice to give an advisory opinion in a dispute between Finland and Soviet Russia (Eastern Carelia Case), the author of the article observes:

Different time—different songs; the generally recognized principles of international law and the elementary principles of international legality seem not to be binding for the "Marshallized" conscience of the Hague judges. . . . As the result we have a new flagrant breach of law by the English-American bloc which has transformed the International Court from an organ which should be the guardian of international legality into a tool of the cold war against the Soviet Union and the countries of people's democracy. The advisory opinion, adopted by the International Court in March, 1950, is a new act of self-disclosure on the part of international reaction and aggression which try to convert the U.N. into a branch of the U. S. State Department, and the International Court into a screen for their policy of international arbitrariness and lawlessness.

Could a Soviet reader of this article expect that the "tool of the cold war against the Soviet Union" could ever adopt an advisory opinion which would approve indirectly one of the legal theses defended before the United Nations by the Soviet Delegation? Yet the unbelievable occurred! In the same month of March, 1950, the Court upheld the view that, according to Article 4 of the Charter, the recommendation of the Security Council relating to the admission of a new Member might not be validly adopted against the veto of one of the great Powers, and that the General Assembly had no right to admit a new Member without the recommendation of the Security Council. Although the other advisory opinion was adopted on March 30 and the one we mention here on March 3, the comments in the *Sovietskoe Gosudarstvo i Pravo* appeared in the reverse order. The May issue carried the fulminating article by Professor E. A. Korovin, who probably wanted to show that he was able to act as a manly member of the Party, while the June issue published the article by B. Borisov under the title "The unsuccessful attack against the principle of unanimity of Great

Powers in the Security Council." Mr. Borisov, being fully satisfied with the Advisory Opinion on the Admission of New Members, did not even mention the fundamental thesis of the Soviet Delegation to the United Nations. As is generally known, this Delegation has upheld with a great consistency during the last five years the thesis according to which the United Nations has no right to ask for advisory opinions concerning the interpretation of the Charter, while the Court has no power to render such advisory opinions. In 1947 the General Assembly adopted a recommendation advising the organs of the United Nations to refer to the Court for its advisory opinion difficult and important points of law, in particular those which would relate to the interpretation of the Charter. The Soviet *bloc* voted against it. The report of the Sixth Committee to the General Assembly contains such a passage:

The Soviet representative requested the insertion in the summary record of his dissenting opinion, the gist of which was that the International Court of Justice had no jurisdiction for interpreting the Charter. In particular, he expressed the opinion that the recommendation would be contrary to the Charter and therefore illegal.

Faithful to its general view the Soviet *bloc* voted against the resolution of the General Assembly which requested the advisory opinion on admissions.

Mr. Borisov does not mention at all in his article the legal point of view of the Soviet Delegation to the United Nations. Yet, according to that view, all advisory opinions concerning the interpretation of the Charter are illegal. But in this case the opinion corresponded to the political line of the Soviet Delegation; therefore, the Soviet author had the tact not to contest the legality of that particular advisory opinion. After a very clear exposé of the problem the author states: "The arguments of the majority of judges seem to us to be correct. . . . Finally one must recognize the positive character of the conclusions of the International Court as given on March 3rd, 1950." Why this praise of the "tools of the cold war"?

Thus, the International Court confirmed, within the limits of the question brought before it, the correctness of the position which has been taken since the beginning of the activities of the U.N. by the Soviet delegation, the latter having maintained that the principle of unanimity of Great Powers is the cornerstone and the foundation of the Organization.

An Argentinian lawyer with a sense of humor could retort that, the point of view of his country having been rejected by the Court, the latter must be a tool of the Red "imperialists."

It is sometimes of practical interest to read in the *Sovietskoe Gosudarstvo i Pravo* the reports of discussions which accompany the defense of dissertations for the rank of candidate of juristic sciences. (This scientific title corresponds to that of *Doctor Juris*, while a Soviet doctor of laws represents

a higher title granted for some outstanding research.) The thesis and the criticism often give a clue to the present or future attitude of the Soviet Government towards international problems, because there is no human possibility of a Soviet candidate or doctor presenting a thesis contrary to the official policy. The May issue of the review reports the defense of the dissertation by Mr. S. V. Molodtsov on "The international legal regime of the Baltic straits" at the meeting of the Learned Council of the Institute of Law of the Academy of Sciences of the U.S.S.R.

Mr. Molodtsov denied the validity of the bourgeois thesis, stating that "The bourgeois jurists who execute the orders of the imperialistic Powers defend the 'right' of an unlimited freedom of access to the Baltic Sea for the warships and merchant vessels of all countries."

Taking as the basis of discussion the fundamental decisions contained in the acts of the Soviet State concerning the question of the regime of the Baltic and Black Seas straits, decisions which result from the essence of the peace-loving policy of the Soviet Union and which correspond to the security interests of the Baltic and Black Seas Powers, the author of the dissertation gives the definition of the legal status of the Baltic straits. According to this definition the straits are maritime waterways, leading to the closed Baltic Sea which is isolated from the world sea highways; they lead to the coasts of only a few coastal Powers. From this particular position of the Baltic Sea and the Baltic straits legally results the right of the Baltic Powers to close, in the interest of security, access to the Baltic to the warships of non-Baltic Powers, as well as the exclusive right of all Baltic Powers to establish the regime of navigation in the Baltic straits, thus guaranteeing the exercise and the security of this navigation.

The author of the thesis invoked the agreements of 1780 and 1800 of the so-called Armed Neutrality which had denied to non-Baltic warships access to that sea. According to his interpretation of the Copenhagen Convention of 1857, the latter safeguarded the right of the Baltic Powers to establish the general regime of the straits and to prohibit access to the Baltic in regard to non-Baltic warships.

Analyzing the existing Copenhagen agreement, the author of the dissertation discloses the deliberate falsification of its meaning by the bourgeois jurists who try to pervert it and to justify thereby the transfer to Denmark of the exclusive right of establishing the regime concerning the passage of warships through the straits.

The conclusion of the article is:

In his conclusion the author of the dissertation proved that the foundation of the international regime of the Baltic straits should be built up upon their effective closing to the warships of non-Baltic Powers. The Baltic States, including the great, peace-loving Power—the Soviet Union, have the right, founded on law and history, to take this step which would not preclude freedom of merchant navigation on the Baltic Sea for all countries, but which would protect the sovereignty and security of the nations populating the coasts of the Baltic.

Usually the author of such a dissertation meets with more or less courteous criticism by the so-called "opponents of the thesis" and even of its director. This time he heard only praises; this might mean that he presented the official views of the Soviet Government. One of the official opponents said that the thesis was completely correct, while "the great value of the dissertation lay in the warm patriotic feeling which permeates the whole work." Another opponent, Professor Korovin, observed that the historical and juristic documentation gathered by the author "may solidly strengthen our point of view concerning this question."

To all this one may add that at the present time the Soviet Union and her satellites (Poland, Eastern German People's Republic and Finland) occupy the greater part of the Baltic coasts, the other coastal Powers being Sweden, Denmark and Western Germany (British zone of occupation). This factual situation largely explains the Soviet thesis.

W. W. KULSKI

AN "ACT FOR THE PROTECTION OF PEACE" IN BULGARIA

On December 25, 1950, with the customary unanimity that characterizes all the decisions of a parliament of a "people's democracy," the Bulgarian National Assembly voted an "Act for the Protection of Peace." As had been indicated in its motives, this Act was passed in execution of the resolutions taken by the second "Peace Congress" that convened in Warsaw in November, 1950.

The Act for the Protection of Peace appears as a rather short document: it has 4 articles only. According to this document, peace shall be protected by introducing extremely heavy sanctions (including life imprisonment) for two newly created criminal offenses which are (1) instigation to war, and (2) war propaganda. Article 1 of this Act states that both offenses shall be regarded as "the most important crimes against the peace and the peoples."

According to this Act, *instigation to war* consists in any activity manifesting itself through the press, by speech, over the radio, or by any other means, aiming directly or indirectly at "provoking an armed aggression on the part of one State against another State."

On the other hand, *war propaganda* can present itself in numerous and extremely varied activities. Such activities may be oral or written, and manifest themselves through the press, the radio, the film, the theatre, literary or artistic works, or any other means in order to exhort the increase of armaments, or the recourse to atomic, hydrogen, chemical and bacteriological warfare; or to extol and diffuse racial doctrines with a view to future wars or the mass extermination of peoples or groups of them; or to undertake any other acts that might aim, as said in the Act, at a "military, economic or spiritual preparation of future aggression."

The Act for the Protection of Peace is worded in rather elastic and general terms, and this will probably lead to an extreme extension of its application. Speaking formally, this Act constitutes a domestic legislative act that should not be applied to persons living abroad, or to incidents which have occurred beyond the Bulgarian frontiers. Owing to the fact, however, that the Act refers to a lot of concepts and activities mainly pertaining to international law, it becomes obvious that the aim of this Act goes far beyond the territorial limits of the Bulgarian "People's Democracy." By voting this Act, the present Bulgarian regime intends to make itself judge of the activities of foreign Powers, institutions or political persons, and to decide, in a unilateral and absolutely sovereign way, whether, for example, a case of war or of aggression has occurred. The decision on such important subjects is, therefore, to be taken exclusively on the basis of subjective Bulgarian criteria.

From the viewpoint of the doctrine of international law, one may state that this Act constitutes a typical example of the efforts of a state to extend the field of its national legislation, and thus penetrate in the sphere of international law. It becomes evident that the Bulgarian Act for the Protection of Peace shows no intention of submitting such a question as to whether there has been an aggression to the authority of the United Nations Security Council. The Act overlooks any step that might have been taken by an international institution in order to maintain peace. Under those circumstances, one can state that the Bulgarian Act for the Protection of Peace totally ignores the existence of international law. This Act tries to emphasize the predominance of municipal law, thus stressing the old-fashioned concept of absolute national sovereignty. This Act is merely the reflection of a theory long since refuted by modern international law.

ANTONII M. NICOLOFF

IMMUNITY OF FOREIGN STATES ENGAGED IN COMMERCIAL OPERATIONS
HOFFMANN v. JÍŘÍ DRALLE, NÁRODNÍ SPRÁVA PODMOKLY, CZECHOSLOVAKIA¹

The firm Georg Dralle runs a perfumery and soap factory in Hamburg-Altona, situated in Western Germany. In 1910 a branch had been formed in Bodenbach, a town situated up to the end of the first World War in the Austrian province of Bohemia, which territory then became a part of the newly created Republic of Czechoslovakia. Hans Hoffmann and his late father, respectively, were for many years the agents of Dralle in Austria. In 1945 the Czechoslovak Government confiscated the Bodenbach establishment and transformed it into a nationalized body, called *Jíří Dralle, Národní Správa*. Certain trademarks were used for many years for the Dralle products, *inter alia* the words "*Colibri*," "*Malattine*," "*Illusion*," etc. They had been registered many years ago in Czecho-

¹ Austrian Supreme Court, May 10, 1950, 2 Ob 167/49 and 1 Ob 171/50.

slovakia in the name of the Bodenbach establishment and, on the basis of those registrations, internationally in Bern under the Madrid Convention concerning International Registration of Trademarks. Such international registration has the same effect as if the trademarks concerned had been registered nationally in the states parties to that Convention. The said trademarks, therefore, enjoyed protection also in Austria, one of the parties to the Convention. As a result of the confiscation of the Bodenbach establishment in 1945 and its transfer to the nationalized body, the trademarks registered in Czechoslovakia were transferred to the nationalized enterprise and used by the latter for the products manufactured in Bodenbach (now called Podmokly). A lawsuit was commenced in the Vienna courts as to the ownership of the said marks in Austria. The decisive question was whether those trademarks were still owned in Austria by the former Dralle branch or had been transferred also with regard to Austria to, and were there owned by, the nationalized enterprise run by the Czechoslovak Government under the above-mentioned name. Hans Hoffmann asked for an interlocutory injunction restraining the nationalized body from using the said trademarks in the Republic of Austria. The Commercial Court in Vienna granted the injunction; the Court of Appeal in Vienna reversed the order of the said court; the Supreme Court as court of the last instance restored the order of the Commercial Court and decided in favor of the plaintiff Hoffmann.

1. The first question at issue was whether the Austrian courts had jurisdiction to entertain an action against the Czechoslovak Republic as the owner of the nationalized enterprise *Jíří Dralle, Národní Správa*, or whether the latter could claim immunity from foreign jurisdiction. In this respect the Supreme Court first reviewed the previous rulings given by Austrian courts and stated that no uniform rule could be derived from the decisions of the Austrian courts, some of them denying jurisdiction over foreign sovereign states irrespective of the character of the claim, whereas in other cases it had been held that immunity applied only if *acta imperii*, not *acta gestionis*, were involved. As the generally recognized rules of international law form a part of Austrian domestic law, the Court considered also the viewpoint in international law with regard to state immunity. In some states state immunity is granted absolutely, unless immovables are concerned or unless the foreign state consents to the domestic jurisdiction. In other states *acta gestionis* are held to be excluded from the privilege of state immunity. Among the first group of states the Court particularly referred to a decision delivered in the United States in 1812 (*The Schooner Exchange v. McFaddon*, 7 Cranch 116), as reported in the *Revue de Droit International Public*, 1936, p. 603 *et seq.* After having reviewed the court rulings given in the various states of both hemispheres, the Court stated that there existed no generally recognized

rule in international law as to the right of absolute state immunity, so that the Austrian courts were not bound by international law to grant exemption from domestic jurisdiction if the foreign state acted not as a sovereign but as a trader in commercial matters or—otherwise expressed—if *acta gestionis* were at issue. On that assumption, the Supreme Court ruled that state immunity extended to *acta imperii* only, but could not be claimed if the suit concerned private dealings (*acta gestionis*). In view of the great importance of that ruling the Court ordered its entry into a Book of Precedents, called *Spruchrepertorium*. It should be noted that, unlike in common law countries, in Austria and most of the other countries on the European Continent, law is not based on precedents but on written, statutory law only and, therefore, decisions of the courts have no binding effect in other cases. To a certain degree, this principle is deviated from if a rule has been entered into the said Book of Precedents because, in such a case, the Supreme Court, but not other courts, is bound by such a rule unless it is reversed by a senate of 15 members of the Supreme Court, and the decision of such a senate is likewise binding upon the Supreme Court unless it is reversed by a senate of 21 Court members. Although even decisions arrived at in such a manner are not legally binding upon other courts, they are in fact adhered to by all Austrian courts. It can, therefore, be assumed that henceforward exemption from domestic jurisdiction will be granted in Austria only in the case of *acta imperii*.

2. The next question to be decided was whether the confiscation of the establishment in Bodenbach had to be recognized with regard to property or rights situated in Austria. The Supreme Court answered that question in the negative. The Court pointed out that it was controversial in international law whether war measures must be held to be effective in other countries at all; the Court referred in this respect, *inter alia*, to the dictum of the United States Supreme Court of December 8, 1947, in *Silesian American Corporation v. Clark* (68 Sup. Ct. 179), but argued that it was not required to deal with this question *in extenso* because in any case war measures need not be recognized by non-belligerent states, as ruled in many countries. The Court considered Austria to be a non-belligerent state, since it had been compelled by force to take part in the war, so that Austria was not bound to recognize confiscatory measures imposed in Czechoslovakia as far as property or rights in Austria were concerned.

3. The above deliberations led the Supreme Court to the conclusion that the trademarks registered in Czechoslovakia in the name of the Bodenbach establishment and transferred there to the nationalized enterprise did not devolve to the latter with regard to Austria. In this respect the Court took the view that foreign trademarks did not necessarily share the fate of the trademarks in the country of origin, but adhered to the principle of independence of such foreign trademarks (denial of the principle of the *situs* of foreign trademarks in the country of origin of the goods concerned).

Those marks, therefore, were considered still to be the property of the former owners so that the nationalized enterprise was not entitled to use them in Austria. Consequently, the interlocutory injunction sought by the plaintiff as licensee of Dralle had to be granted.

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SOME UNSOLVED PROBLEMS REGARDING WAR DAMAGE CLAIMS UNDER
ARTICLE 78 OF THE TREATY OF PEACE WITH ITALY

In escaping from the caves of the Minotaur, Theseus was aided by the thread given to him by Ariadne. There is not even a line of sweet reasonableness to enable one to solve the intricacies and perplexities of Article 78 of the Treaty of Peace with Italy,¹ made more intricate and more perplexing by the so-called Lombardo Agreement of August 14, 1947,² which was intended to clarify its provisions.

This article is not intended to solve, but only to indicate a few of the many problems which may arise. Their solution will not depend on Theseus, but upon the judgment of the Conciliation Commission set up under Article 83 of the Treaty to settle disputes.

1. *Nationality of Claimants*

Under the Treaty, to qualify for its benefits, a claimant must be a United Nations national, and must have been such on September 15, 1947, the date the Treaty became effective, and on September 3, 1943, the date of the Armistice with Italy. However, Section 18 of the Agreement broadens the definition and also permits presentation of a claim if the claimant was such a national at the time the damage occurred to the property, which may have been after September 3, 1943. If a claimant were a Frenchman on September 3, 1943, but prior to September 15, 1947, became a naturalized American citizen, the American Government would probably alone or in concert with the French Government present his claim because he was at all times a United Nations national. Let us suppose, however, that on September 15, 1947, a claimant enjoyed dual nationality, his other nationality being Swiss or German. Such a claim might be advanced only if the claimant at the time of the loss had been a non-resident of an enemy country, or even if a resident, had been loyal to the Allied and Associated

¹ Treaties of Peace with Italy, Hungary, Bulgaria, Roumania and Finland (Department of State Publication 2743) p. 1, at p. 34; this JOURNAL, Supp., Vol. 42 (1948), p. 47, at p. 76.

Wherever the word "Treaty" is used, reference is to Art. 78 unless otherwise stated.

² Memorandum of Understanding between the Government of the United States of America and the Government of Italy Regarding the Settlement of Certain Wartime Claims and Related Matters, hereinafter called the "Agreement"; this JOURNAL, Supp., Vol. 42 (1948), p. 146.

Powers, or had been "treated as enemy" and not affiliated with the Nazis. However, the Italian authorities might also assert that the claimant, as well as being a United Nations national, was of neutral or enemy nationality and for the purpose of war damage compensation must be considered the latter.

Under the Treaty, those who under the laws in force in Italy during the war were "treated as enemy" are included within the definition of the term "United Nations national"; in defining this latter term, Section 18 of the agreement omits those "treated as enemy," but the Agreement is not considered as limiting the Treaty definition. However, the question of when one can be considered as having been "treated as enemy" assumes real importance in the case of the Jews who fled from Nazi persecution, some of whom acquired American citizenship after September 3, 1943, and after the date on which the damage occurred to their property. Therefore, a brief resumé of the Italian laws on the subject is in order here.

Italian Decrees No. 1381 of September 7, 1938,³ and No. 1728 of November 17, 1938,⁴ required foreign Jews and those who had acquired Italian citizenship after January 1, 1919, to leave Italy, Libya and the Italian possessions in the Aegean Islands before March 12, 1939, on penalty of expulsion, and deprived the latter of their citizenship. The latter decree added a fine or a three-month prison term for non-compliance and restricted considerably the activities of Italian citizens of the Jewish race, providing that they could not own lands worth more than 5,000 lire or urban dwellings having a taxable value of over 20,000 lire, and could not own or manage firms concerned with the national defense or employing more than 100 people.

Decree No. 126 of February 9, 1939,⁵ required the transfer of all real property in excess of that which Italian citizens of the Jewish race were allowed to own to E.G.E.L.I. (*Ente di Gestione e Liquidazione Immobiliare*), which was empowered to sell or otherwise dispose of such property; and also the transfers of all concerns in which they could not participate to E.G.E.L.I., which was again empowered to sell them and place the proceeds in non-transferable bonds issued by the Italian Government.

With respect to property in Italy, the Italian racial laws, including those referred to above, but excluding any which may have been proclaimed by Mussolini's short-lived Republic of Saló, applied only to Italian citizens of the Jewish race, and not to other members of the Jewish race, whether resident or non-resident in Italy, who were not Italians. However, foreign Jews, as well as those who had become Italian citizens after January 1, 1919, having been expelled from the country, found it practically impos-

³ *Gazzetta Ufficiale*, No. 208, Sept. 12, 1938, p. 3871.

⁴ *Ibid.*, No. 264, Nov. 19, 1938, pp. 4794-4796.

⁵ *Ibid.*, No. 35, Feb. 11, 1939, pp. 732-741.

sible to use their property or to take it or the proceeds of any sale thereof out of the country.

Citizenship rights were restored only by Decree No. 25 of January 20, 1944, and patrimonial rights by Decree No. 26 of the same date⁶ which did not become effective until October 20, 1944. The latter decree required E.G.E.L.I., or the third parties to whom they had been transferred, to return the real estate or other property taken.

If an Italian corporation had its property seized under a decree of sequestration as enemy property (and not sold but merely managed by E.G.E.L.I.), or an American were interned, that would certainly be considered as having been "treated as enemy" under section 9 (a) of Article 78 of the Treaty of Peace with Italy. Although the racial laws were enacted prior to the declaration of war, at a time when there were no "enemies" of Italy, yet their effect was infinitely more damaging than the mere sequestration of enemy property and they were continued "in force in Italy during the war" as specified in said section 9 (a). Therefore, it is believed, from an objective, not a subjective, Italian study of these decrees, that at least Italian citizens of the Jewish race affected by the decrees above referred to, whose property was damaged or destroyed prior to October 20, 1944 (the effective date of Decree No. 26 of January 20, 1944, which provided for the return of the property taken from them), should be considered as having been "treated as enemy" and their claims presented by the American Government if they were citizens of the United States on September 15, 1947.

There is a contrary argument to the effect that Article 25 of the Rumanian Treaty and Article 27 of the Hungarian Treaty⁷ specifically provide for the restoration of properties sequestered or confiscated on account of the racial origin or religion of the owner. Since section 9 (a) of both Article 24 of the Rumanian Treaty and Article 26 of the Hungarian Treaty are the same as section 9 (a) of Article 78 of the Italian Treaty, and since an article similar to Article 25 of the Rumanian and Article 27 of the Hungarian treaties was omitted from the Italian Treaty, it was intended that persons who came under the Italian racial laws should not be considered as having been "treated as enemy." This argument is not believed to be sound. No inference of any kind need be drawn from the omission in the Italian Treaty of an article returning properties taken on account of racial origin, because it was unnecessary to include such an article in the Italian Treaty, since the Italian decrees of 1944 had already provided for the return of such sequestered and confiscated properties. However, if an inference must be made, the reverse one seems to be more in order, since the insertion of such a clause in the Rumanian and Hungarian treaties

⁶ *Gazzetta Ufficiale*, No. 5, Feb. 9, 1944; *ibid.*, *Serie Speciale*, No. 71, Oct. 20, 1944.

⁷ For texts of Hungarian and Rumanian treaties, see Dept. of State Publication 2743; also this JOURNAL, Supp., Vol. 42 (1948), pp. 225, 252.

would indicate that in those two countries such persons had not been "treated as enemy"; while its very omission in the Italian Treaty might be said to indicate that in Italy they had been so treated, and thus came within the purview of section 9 (a) of Article 78.

On January 4, 1944, Decree No. 2 of the Republic of Saló^{*} enacted some "new regulations concerning property owned by Italian citizens of the Jewish race." This decree made specific reference to the earlier decrees of the legitimate Italian Government (No. 1728 of November 17, 1938, and No. 126 of February 9, 1939) and abrogated all inconsistent provisions. Notwithstanding its title, Article 7 of this decree provided for the confiscation by the state of all property, both real and personal, tangible and intangible, not only belonging to Italian citizens of the Jewish race, but also belonging to foreign Jews whether resident or non-resident in Italy. All such property was to be turned over to E.G.E.L.I., which was authorized to sell it and deposit the net proceeds in the State Treasury for the purpose of payment of damages caused by enemy air attacks. Severe fines and prison sentences were to be imposed for violation of the law.

Unquestionably this decree was far worse than the previous decrees of the legitimate Italian Government, and since it provided as well for the confiscation and sale of all property belonging to foreign Jews, whether resident or non-resident, foreign Jews could also be certainly considered as having been "treated as enemy" pursuant to its provisions. However, it is not believed that the present Government of Italy is responsible in any way for this law and therefore its content is immaterial.

Section 9 (c) of Article 78 of the Treaty provides: "The term United Nations nationals also includes all individuals, corporations or associations which under the laws *in force in Italy* during the war were treated as enemy." It is thought that this legally refers to the laws "*in force throughout Italy*" which can only mean the laws of the present Italian Government and its legitimate predecessor. The Republic of Saló was no more than an insurgent government set up with the aid of the German Army of occupation in northern Italy with Mussolini at its head; it was not a legal continuation of the Government of King Victor Emanuel III, as Mussolini had been deprived of his authority, and administrative control was vested in the hands of Marshal Badoglio. Furthermore, the Republic's laws were only effective in that *part* of Italy controlled by it.

It is a general rule of international law that where an armed insurrection has gone beyond the control of the parent government, that government is not responsible for damages to foreigners by the insurgents. Consequently, even if foreign Jews were "treated as enemy" by the Republic of Saló's Decree No. 2 of January 4, 1944, this does not mean that they were so treated by the Government of Italy, since that government was un-

^{*} *Gazzetta Ufficiale*, No. 6, Jan. 10, 1944, pp. 31-33.

able to prevent such treatment and itself, on October 21, 1944, had by law restored all patrimonial rights to Italian citizens of the Jewish race, and by Decree No. 222 of April 12, 1945,⁹ had enacted regulations for the return of the property rights of Italian citizens and foreigners who came under the racial laws (those who became Italian citizens after January 1, 1919, and had been deprived of their citizenship).

A sovereign nation has the right to say what foreigners shall be permitted to remain in its territory. If foreign Jews were expelled in 1939 when there was no war, such action was obviously a matter of domestic legislation and standing alone would not have made them "treated as enemy." When war broke out, if they were *then* American Jews, their property would automatically have been sequestered as enemy property anyhow and they could present claims for damages under the Treaty provisions. If they were then citizens of neutral countries, they might claim that, because of their expulsion without the privilege of taking their property with them out of Italy, they were deprived of it without due process of law; the countries of which they were nationals could then present a claim on their behalf under the ordinary rules of international law and the amount of indemnity would not be two-thirds, but the amount of damage sustained at the time of its occurrence.

The real problem thus arises only in the case of the expulsion of Jews of German origin, most of whom were probably stateless. Unless, for the reasons hereinafter stated, the damage to their property occurred in the short period between January 11 and June 2, 1945, the American Government would probably not undertake to present their claims for compensation, because, not having been "treated as enemy" by the Italian Government, they were not even United Nations nationals. However, under Italian Decree No. 1415 of July 8, 1938,¹⁰ stateless persons who were at any time nationals of an *enemy* state were considered as enemies. In the *Gazzetta Ufficiale* No. 5 of January 11, 1945, a decree of the President of the Council of Ministers was published to the effect that Germany was from that date considered as an enemy state. Probably inadvertently, this decree officially made enemies of stateless German Jews, and so a further decree of May 7, 1945, of the President of the Council of Ministers was published in the *Gazzetta Ufficiale* No. 55 of June 2, 1945, nullifying the provisions of the prior decree of January 11, 1945, with respect to stateless persons who once had German nationality. These two decrees indicate, from a subjective viewpoint, that the Italian Government did not believe it had, prior to January 11, 1945, "treated as enemy" stateless German Jews and inferentially that it did not consider itself responsible for the decrees of Mussolini's Republic of Saló. Nevertheless, Jews of German

⁹ *Gazzetta Ufficiale*, No. 61, May 22, 1945, pp. 711-743.

¹⁰ *Gazzetta Ufficiale*, No. 211, Supp., Sept. 15, 1938, pp. 1-38.

origin, if the damage to their property occurred between the dates of these two 1945 decrees when they were "treated as enemy," should be entitled to compensation under the provisions of Article 78, if they were U. S. citizens on September 15, 1947. A solution of the difficulties of this unfortunate group of individuals may perhaps ultimately be sought by direct agreement with Italy, through some action by the United Nations or in the Peace Treaty with Germany, if one is ever written.

Returning again to Article 78 of the Peace Treaty with Italy, we find that except for its definition, the word "owner" is used only once therein in paragraph 8, which grants an owner the right to settle his claim directly with the Italian Government without regard to the other sections of the article. It is defined as including a "successor" who is also a United Nations national. If an American owner of damaged property had transferred both his property and the right to claim compensation for war damage to an American corporation organized after September 15, 1947, or to an American citizen who had been naturalized after that date, or such rights were inherited by an American child born after that date, compensation might possibly be refused on the ground that the claimant assignee was not a United Nations national on the date the Treaty went into effect. If a valid claim of a United Nations national had been transferred to a Swiss and reassigned to a United Nations national before September 15, 1947, the chain of title might be so broken as to prevent consideration of the claim.

Pursuant to the terms of both the Treaty and the Agreement, any corporation is legally entitled to have its claim presented, regardless of the nationality of its stockholders, if it was organized in the United States; but it is not likely that the claim would be so presented, if the stock were largely owned by neutrals or enemy aliens, unless the latter's interest were represented by the Office of Alien Property. However, an Italian corporation "treated as enemy" should be able to recover for war damage sustained, though some portion of its stock might have been owned by Italians. If objection is made that this grants such a corporation preferential treatment as compared to its Italian competitors, the answer seems to be that its competitors did not suffer the disabilities of sequestration. Furthermore, under paragraph 4 (b) of the Treaty, even a small direct or indirect American interest in any ordinary Italian corporation which sustained war damage is entitled to be compensated to the extent of its proportionate interest therein.

2. *Nature and Amount of Indemnity*

So much for the effect of the nationality of the claimant on his right to make a claim. But what can he claim? Under section 4 (a) of the Treaty, monetary compensation is restricted to lire and is not payable in dollars. The amount is based on the sum necessary *at the date of payment* to pur-

chase goods similar to those destroyed or to make good the loss suffered. It is beyond comprehension how any reasonable man can determine today the cost of an article six months or six years hence when payment may be made. He cannot, and consequently claims must be based on present-day values subject to reconsideration and adjustment at the date of payment. Since there is no express time-limit for the presentation of claims, a claimant might gamble on an increase in the cost of repair of his damaged property, delay for a long time the presentation of his claim, finally receive a larger compensation, and then never repair the property.

The first sentence of paragraph 4 (a) of the Treaty also states that the "Italian Government shall be responsible for the restoration to complete good order of *the* property *returned* to United Nations nationals under paragraph 1." The latter provides that Italy shall "*return all* property in Italy of the United Nations and their nationals as it now exists." It is asserted that this first sentence of paragraph 4 (a) relates solely to sequestered property, because property must have first been sequestered to be "returned," and, consequently, this implies that the rest of this paragraph relates *only* to sequestered property, even though it continues:

In cases where *property* can not be returned or where as a result of the war a United Nations national has suffered a loss by reason of injury or damage to *property* in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered.

The contrary and probably stronger argument is that this implication was eliminated by the use of the word "all" instead of "the" before the word "property" in paragraph 1 and that the first sentence of 4 (a) does not control the balance of the paragraph. Thus, while only sequestered property need be returned and restored "to complete good order," as provided in the first sentence, compensation, as specified in the balance of paragraph 4 (a) must also be paid for non-sequestered property damaged or destroyed, or sequestered property no longer in existence. It was later provided in section 16 (a) of the Agreement that the requirement for the return "to complete good order" applied to all cases to which paragraph 4 (a) applied (which would at the very least cover sequestered property), and section 16 (b) of the Agreement extended this to property not covered by section 16 (a), so clearly *all* property whether sequestered or non-sequestered is now included. However, application of this requirement was limited to cases where there had been (1) *deterioration* of the physical property while under Italian control, or (2) where the physical property had suffered *non-substantial* damage as a result of acts of war. But there is no definition of the word "deterioration" and no indication whether it refers to acts of non-feasance, malfeasance or misfeasance by the Italian authorities or to all of them. There is no definition of the word

"non-substantial," and it is not clear whether that damage would be considered substantial when there was destroyed a key part of a piece of machinery, itself of insignificant value but without which the machine could not function, or only when the cost of repair exceeded a definite percentage of the value of the property repaired. If the latter, further questions would be whether each unit of the claimant's property should be considered separately or all of it as a whole and what "complete good order" meant—one hundred percent efficiency or, as is more likely, only that condition in which the property was on June 10, 1940, on which date, under paragraph 1 of the Treaty, Italy was obligated to restore all legal rights and interests as they then existed. At the date this was written, none of these problems seem to have been definitely solved nor had a further interpretative agreement been concluded with the Italians.

It has been alleged by others, not affected by the Agreement, that the Italian obligation under paragraph 4 (a) of the Treaty to restore "to complete good order" applies to *all* property, sequestered or non-sequestered, and that the provision for two-thirds compensation of the "sum necessary to purchase similar property or to make good the loss suffered" is only a sanction for its application, since it would be foolish to assert that sequestered property *totally* destroyed should receive two-thirds compensation, while full compensation should be paid for sequestered property *partially* destroyed. The fallacy of this argument seems to lie in the fact that it would have been quite useless to specify the various cases in which two-thirds compensation is to be paid if that were only the sanction for the return of all property to good order. It has also been asserted that the Italian primary obligation is to restore to good order all property, sequestered or non-sequestered, and that the provision of two-thirds compensation is not meant as a sanction but as additional compensation, not for the physical damage to the property, but to "make good the loss suffered" for such things as marketing damages and loss of good will.

Confusion even exists over the meaning and application of the phrase "to make good the loss suffered." A man whose house was totally destroyed will presumably not recover two-thirds of its original cost but two-thirds of its replacement cost on the date the claim is paid; but if a man's bank account were sequestered, whether there is returned to him the full amount of lire he had on deposit, or only two-thirds thereof, if he is paid in present-day depreciated lire, he will actually receive back about one-thirtieth of the value of his property, since money cannot be disassociated from its present-day purchasing power. It is argued that anyone doing business in a foreign country takes the risk of currency inflation. In normal times this is true, because there is always the opportunity at any given moment to convert money into physical property, but sequestration prevented this. However, this argument is somewhat supported by inference from section 17 (b) of the Agreement. The Italian Government here

assumes the obligation, at the earliest date permitted by its foreign exchange position, to make available *foreign exchange* to take care of debts, expressed in non-lira currencies, owed by Italian nationals which the latter have actually discharged by lira payments to Italian Government agencies to the credit of United Nations nationals. The negative inference to be drawn from these provisions is that it was thus intended under the Treaty that ordinary lira bank accounts be restored in present-day depreciated lire. But no one knows when the Italian foreign exchange position will enable the Italian Government to make foreign exchange available for the payment of debts expressed in non-lira currencies.

Under paragraph 4 (d) of the Treaty, the Italian Government also assumes the obligation similarly to compensate United Nations nationals for loss or damage due to "special measures" applied to their property during the war and which were not applicable to Italian property; but it is specifically stated that this does not apply to "a loss of profit." It has been suggested that "special measures" refer only to restrictions placed on the business activities of United Nations nationals and not to measures of sequestration. If that be so, a negative inference can again be drawn that "a loss of profit" should be allowed in sequestration cases. In these, a United Nations national would have had no opportunity personally to make profit, since control of his enterprise was completely taken away from him; whereas in the case of special measures, his control was merely limited and he still had some chance to make a profit.

Paragraph 6 of the Treaty provides for the exemption of United Nations nationals and their properties from any exceptional tax on their capital assets in Italy levied for the purpose of meeting charges arising out of the war. When the Italian Government levied a patrimonial tax, the interpretation of this paragraph became important. The question that immediately comes to mind is whether it should be determined by an objective or a subjective standard that a tax is for a specific purpose—what the tax accomplishes and not necessarily what the legislature expressly says the tax is for. Whether the tax is "exceptional" may depend not only on whether it is placed alone on United Nations nationals and not on Italians, but also whether it is unusual in kind or amount.

Paragraph 7 of the Treaty makes Italy continue to be responsible for the loss or damage sustained during the war by property in ceded territory, and the problem arises whether the Italian colonies are included in the term "ceded territory." Those who reply in the affirmative say that the colonies have in fact been ceded, although it is not yet known to whom; that they are at least in a condition analogous to cession, and if Italy is to be responsible for war damage to property of United Nations nationals in Italy and the ceded territories, an exemption in case of her former colonies is illogical. Those who oppose declare that there are strong political reasons for avoiding any idea of cession and that paragraph 19 of

Annex XIV of the Treaty, "Economic and Financial Provisions Relating to Ceded Territories," specifically provides that the Annex does not apply to the former Italian colonies; they suggest that Italy merely renounced her sovereignty over them, there is no one to whom a cession has been made, and there can be no cession until they are disposed of by the four Great Powers as provided in Article 23 of the Treaty.

3. *Invalidation of Measures against United Nations Property*

Paragraph 2 of the Treaty, in substance, provides that the Italian Government shall nullify all measures, including seizures, sequestration or control taken *by it* against United Nations property between June 10, 1940, and September 15, 1947, when the Treaty came into force. Section 16 (a) of the Agreement says that Italy will expedite arrangements for the desequstration and release of any unusual controls over the property or interests in Italy of nationals of the United States of America, including the cancellation of any controls, contracts, agreements, or arrangements undertaken during the period of control in accordance with the request, or at the direction, of the Government of Italy, its agencies or officials, which are not deemed to have been in the best interests of such property or interests. There are, however, no specific provisions detailing exactly what the Italian Government must do to carry out this obligation or when it should do it. Consequently, there have been instances where, because of inaction, insufficient or tardy action by the Italian authorities, American nationals have experienced some hardship. In some cases, sequestrators have rented premises at very low rentals or fraudulently disposed of property to third parties, or the latter have purchased such property at illegal tax sales allegedly held to pay the expenses of sequestration. When the property is "reconsigned" to the owner, he may either find it in the possession of tenants that he cannot evict, or most of the valuable property missing or in the hands of others. Italian law provides remedies through actions instituted by the local *Intendenza di Finanza* to evict such tenants or through actions to recover the articles sold or improperly acquired. However, statutes of limitation and other legal technicalities may prevent such suits being brought, and even if they are commenced, the delays of the Italian courts are such that it may be years before a case is disposed of, and in the meanwhile the United Nations national has been deprived of both his rights and property. Yet when the Conciliation Commission, above referred to, commences to function it may be able to assert jurisdiction and remedy this situation through its judgments.

Paragraph 3 of the Treaty also provides that the Italian Government shall invalidate transfers involving property rights and interests of any description belonging to United Nations nationals where such transfers *resulted* from force or duress exerted by Axis governments or their agencies

during the war. It has been contended that all transfers of property by sequestrators, whether or not made in good faith, must be set aside, since, insofar as the owner is concerned, the transfer was against his will and under duress. But surely it is reasonable to assume that it was intended that such action should be limited to those transfers not made in the best interest of the property as specified in Section 16 (a) of the Agreement.

While it is fairly clear that a transfer of property by a government official such as a sequestrator may possibly be considered the result of force or duress, a transfer by one individual to another may also be said to have *resulted* from "collective duress" exercised by the Italian Government. Under Nazi laws, former residents of Germany were required to return their stockholdings to Germany where they would be converted into almost worthless blocked German currency. Since the Italian law provided for the expulsion of Italian Jews of foreign origin and the confiscation of their stockholdings, and because of the collaboration between the two countries, it was also reasonable to expect that such shares might be confiscated and returned to Germany, and individuals may have been frightened into disposing of their holdings at ridiculously low prices. In some cases, friendly Italians to whom property had been transferred to conceal foreign interests were compelled by other Italians, through the threat of exposure and consequent punishment, to sell it or practically give it away, and such transactions should be set aside.

The more one studies Article 78, the more problems come to mind, and not all of them have been presented here. It is charitable to conclude that the necessity of reaching agreement by treaty outweighed in the minds of the framers the benefits of clarity of expression.

ALBERT E. KANE *

22ND SESSION OF THE HAGUE ACADEMY OF INTERNATIONAL LAW

The Hague Academy of International Law will hold its twenty-second session for four weeks beginning on July 16 and ending on August 11, 1951. The course will consist of three lecture periods each morning for five days a week and one or two seminar sessions on some afternoons. The provisional program, as recently announced, includes lectures on the historical development of international law, the principles of international public law, administrative, economic and financial law, and international organization. Among the lecturers will be: Professor Raja Gabaglia of the University of Rio de Janeiro, who will speak on "Frontiers in Latin-America; Dr. Charles G. Fenwick, Director of the Department of International Law and Organization of the Pan American Union, who will give a general course on international public law; Professor Erik Castrén of

* * The views expressed herein are the personal views of the author only.

the University of Helsinki, who will lecture on "Succession of States—Recent Aspects"; Mr. Jan Hostie, Honorary Juridical Counselor of the Belgian Ministry for Foreign Affairs, who will speak on "Transport of Merchandise in International Law"; Professor Walther Hug, of the Polytechnicum of Zürich, who will discuss "The Law of International Payments"; Dr. Ivan Kerno, Assistant Secretary General of the United Nations, whose topic will be "The Organization of the United Nations and the International Court of Justice"; Mr. Émile Giraud, of the Legal Department of the United Nations Secretariat, who will discuss "The Secretariat of International Institutions"; Professor René Cassin of the Paris Law Faculty, who will speak on "The Universal Declaration of Human Rights and Its Execution"; Dr. Hans Wehberg, Professor at the Institut Universitaire de Hautes Études Internationales, whose theme will be "Prohibitions of the Use of Force—The Principle and the Problems which Arise"; and Professor A. L. Goodhart of University College, Oxford, who will discuss the Atlantic Pact.

The courses, which are given in English or French, are designed to supplement university training and are open to those who already have some background in international law and wish to improve their knowledge of the subject. The Managing Board of the Academy passes upon admissions to the courses, conferences and seminars. Applications for admission and further information concerning the session may be obtained from the Secretariat, Room 50, The Peace Palace, The Hague.

The Academy instituted at its 1950 session the conferring of a diploma upon students who attend the courses and successfully pass examinations at the end of the session. The examinations are both oral and written, and are based upon questions discussed in the seminars and lectures attended, as well as upon the main topics of international law. A candidate for an Academy Diploma must hold a university degree which, in the opinion of the Curatorium of the Academy, is adequate both as to subjects and standards; or must have completed a course of professional legal studies in conformity with the program legally prescribed in the country where he has studied. He must also show some special knowledge of international law by means of a scientific piece of work or otherwise. Candidates for the diploma must file with the Secretariat of the Academy at The Hague, not less than two calendar months before the date of the opening session, certificates and other documents and information necessary to qualify them as candidates.

The Academy Diploma is distinct from the Certificate of Regular Attendance, which is awarded without examination to students who have attended the general lectures and a specified number of other lectures of their choice.

E. H. F.

INTERNATIONAL COMMITTEE FOR COMPARATIVE LAW

Problems of legal documentation were the principal concern of the mid-winter meeting in Paris of the Executive Bureau of the International Committee for Comparative Law. Since the organization of the Committee in March, 1949, under the auspices of UNESCO, applications for membership have been accepted from national committees constituted in Belgium, Brazil, France, Germany, Greece, Guatemala, Haiti, Italy, Mexico, Nicaragua, Peru, Spain, the United Kingdom and the United States. The national committee for the United States is the American Foreign Law Association, of which Phanor J. Eder is President. Its representative on the Executive Bureau is Alexis Coudert.

The task set for the future is to prepare during 1951 a catalogue of sources of information on the law in the principal areas of the world, including a list of all legal periodicals and serial publications, with extensive information on their character, editors, size and cost. There will also be included a list of centers of legal activity, law libraries and international organizations engaged in legal research. William S. Barnes has been appointed by the American Foreign Law Association to coordinate the contributions of American specialists to this project.

A second project is planned for 1951, namely, the preparation of a report on the teaching of law in eight countries of the world (Egypt, France, India, Mexico, Poland, Sweden, the United States and the United Kingdom). The report is to stress the rôle of law teaching in the educational system and is to be a synthesis and not a mere enumeration. Professor Niboyet of France will be the General Reporter for the series, while John N. Hazard will coordinate the group of American authors.

The International Committee has established a long-range project to encourage preparation of (a) bibliographies of legal literature basic to an understanding of each jurisdiction or system of law, together with yearly supplements; (b) a basic introduction to the law of one or two countries to serve as a pattern to be followed by others; (c) a yearbook on the law of one of the countries already introduced, the yearbook to serve as a pattern for others; (d) a plan for uniform indices and format susceptible of translation and compilation in a single loose-leaf world yearbook of law; and (e) the formation of centers of documentation in each country with the hope eventually of establishing an international clearing-house between these centers.

The next meeting of the Executive Bureau is to be held in Paris in July, 1951, and a subsequent meeting will be held at the University of Cambridge, England, in July, 1952, in conjunction with a program in comparative law planned for that time by the University.

J. N. H.

MOUNT HOLYOKE INSTITUTE ON THE UNITED NATIONS

The fourth session of the Mount Holyoke Institute on the United Nations is planned to open at South Hadley on June 24th and close July 21st. The program will deal with the crucial world problems confronting the United States and the United Nations today. The Institute will again provide men and women concerned with world affairs an opportunity for study and discussion with officials of the United Nations, United States and foreign governments, and with specialists in international affairs. Each week emphasis is placed on America's rôle in the United Nations, the opinions of other peoples, and the possibilities of activities at the local community level. Weekly trips to the United Nations headquarters in New York are a special feature of the Institute.

The Institute is now in its fourth year under the sponsorship of the Carnegie Endowment for International Peace, Foreign Policy Association, Woodrow Wilson Foundation, World Peace Foundation and the following New England colleges: Amherst College, Bowdoin College, Brown University, Clark University, Connecticut College, Mount Holyoke College, Smith College, Springfield College, Trinity College, University of Massachusetts, Wellesley College, Wesleyan University, Wheaton College and Williams College.

Fees last year were \$60 each week, divided into \$25 for tuition and \$35 for room and board, or \$230 for the entire session. It is hoped that they can be kept approximately the same in 1951. A few tuition scholarships will be available. Possibilities are being explored for arranging with nearby universities for the offering of summer school credit. Applications for admission and scholarships should be made to the Executive Secretary, Mount Holyoke Institute on the United Nations, South Hadley, Massachusetts.

TEACHING VACANCY AT HEBREW UNIVERSITY OF JERUSALEM

The Hebrew University of Jerusalem hereby gives notice of a vacancy in the position of Lecturer in International Relations. Details on the position and conditions for application may be obtained by writing to The Academic Secretary, The Hebrew University, Jerusalem, Israel. Since the language of instruction at the University is Hebrew, the candidate must either possess sufficient knowledge of the language, or undertake to acquire a working knowledge of it within a reasonable period of time. The term Lecturer is used here in the English connotation; the post of Lecturer is a permanent one, equivalent at least to that of Assistant Professor (in the United States).

JUDICIAL DECISIONS

BY WILLIAM W. BISHOP, JR.

Of the Board of Editors

[With the assistance of Mr. Donald S. Leeper, made possible by the W. W. Cook Legal Research Endowment of the University of Michigan Law School.]

Dependent areas—Puerto Rico and United Nations Charter

RUIZ ALICEA v. UNITED STATES. 180 F. (2d) 870.

U. S. Ct. of Appeals, First Circuit, March 10, 1950. Magruder, C. J.

The court affirmed the District Court for Puerto Rico in convicting a Puerto Rican citizen of the United States for violation of the 1948 Selective Service Act, despite his elaborate contentions that this Act did not lawfully apply to Puerto Rico because, allegedly, (1) the Treaty of Paris by which Spain ceded Puerto Rico to the United States was void; (2) Puerto Rico lacked Congressional representation; (3) the imposition of Selective Service on Puerto Ricans violated Article 73 of the United Nations Charter under which "Members . . . which have . . . responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount"; and (4) a Resolution with respect to Puerto Rico was adopted in 1949 by the American Committee on Dependent Territories constituted pursuant to a resolution of the Bogotá Conference of American States in 1948.

Upholding the validity of the Treaty of Paris, the court emphasized that "Appellant could hardly expect us, as an intermediate appellate court, to undertake to overrule a half-century of history." Although greater self-government for Puerto Rico was to be hoped for, Congress clearly had power to draft American citizens residing in the District of Columbia, and even resident aliens. As for Article 73 of the Charter, the court denied the contention that military service obligations were for the sole benefit of the United States and to the detriment of Puerto Rico, saying:

In accepting the obligation to promote the well-being of the people of Puerto Rico, the United States presumably would be expected to protect the inhabitants of the island from subjugation by a hostile power. It would therefore seem not unjust, or to the detriment of the people of Puerto Rico, to require their service in the armed forces of the United States on an equal basis with residents of the continental United States.

Furthermore, as Article 73, unlike the trusteeship provisions, "provides no machinery for international supervision and control of the administration

on non-self-governing territories," the court concluded that this article "did not have the legal effect of altering the domestic status of Puerto Rico under the Constitution of the United States, or of curtailing the constitutional power of Congress to legislate with reference to such territory."

As for the Resolution of the American Committee on Dependent Territories, this "seems to have gone beyond the competence" of the Committee, which was "assigned the general function of seeking pacific means of eliminating 'colonialism and the occupation of American territories by extra-continental countries'," while appellant had not indicated on what theory an American court could recognize a resolution of this Committee "as having the slightest legal effect upon the status of Puerto Rico under the American flag."

Jurisdiction—treason by nationals abroad—continuing allegiance

GILLARS v. UNITED STATES. 182 F. (2d) 962.

U. S. Ct. of Appeals, Dist. of Col., May 19, 1950. Fahy, Ct. J.

Upholding the conviction of an American citizen for treason consisting in her voluntarily broadcasting in Germany for the German Government during World War II, the court discussed a number of points relating to the American occupation of Germany. It answered the argument that defendant was entitled to asylum in Germany, apparently by virtue of the Extradition Treaty of 1930 between the United States and Germany, by saying that the treaty applied "only to fugitives who had fled the country where the crime was committed," and that the right to give asylum to political offenders "is that of the State voluntarily to offer asylum, not that of the fugitive to insist upon it." As to her argument that a citizen residing in enemy territory is under the obligation of local allegiance, the court added:

obedience to the law of the country of domicile or residence—local allegiance—is permissible but this kind of allegiance does not call for adherence to the enemy and the giving of aid and comfort to it with disloyal intent. . . . It is not disputed . . . that a citizen in enemy country owes temporary allegiance to the enemy government, must obey its laws and may not plot or act against it. . . . But in a trial for treason involving the question of failure to live up to the obligation of allegiance attaching to citizenship the question is for the jury to determine on the evidence whether what was done fell within permissible obedience to a foreign power or within the area of treason.

The court rejected her contentions that her duties to the United States had ceased before her broadcasting in Germany, by reason of revocation of her passport by an American consular officer; "the revocation of a passport . . . does not cause a loss of citizenship or dissolve the obligation of allegiance arising from citizenship." Nor did her signature of a paper in German prepared by an associate, which she said stated that she swore

allegiance to Germany, amount to an oath of allegiance such as would expatriate her; it was too informal and vague, no intention to renounce American citizenship by it was shown, and there was no official connection of the oath with the German Government.¹

Aliens—war criminals—appeal in forma pauperis

NASH v. MACARTHUR. 184 F. (2d) 606.

U. S. Ct. of Appeals, Dist. of Columbia, July 31, 1950. Fahy, Ct. J.

The right to proceed *in forma pauperis* being limited to American citizens, an American citizen attorney who had aided in the defense of seven Japanese war criminals convicted by American military commissions was denied permission to appeal *in forma pauperis* from a denial of habeas corpus, the "real" appellants being the alien Japanese.

Jurisdiction—crime on aircraft over high seas

UNITED STATES v. CORDOVA. 89 F. Supp. 298.

U. S. District Court, E. D. N. Y., March 17, 1950. Kennedy, D. J.

Defendant was charged with assaulting the pilot, stewardess and passengers while a passenger on an airplane owned by an American corporation and flying over the high seas between Puerto Rico and New York. Under 18 U. S. Code, §§ 451 and 455, assault is punishable

when committed upon the high seas . . . within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or when committed . . . on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State . . . thereof.

A jury being waived, the court found defendant guilty but arrested judgment of conviction "since there is no federal jurisdiction to punish those acts." Discussing the cases construing the term "vessel," the court found that the statute did not cover crimes committed on airplanes. Further, the cases concerning "high seas" did not warrant "the extension of the words 'high seas' to the air space over them." The court added that it had "little doubt that had it wished to do so Congress could, under its

¹ See also *Best v. U. S.*, 184 F. (2d) 131 (Ct. App., 1st, July 6, 1950), affirming the conviction of an American citizen for treason committed in Germany by broadcasting for Germany in World War II, 76 F. Supp. 138 and 857 (D. Mass., 1948), this JOURNAL, Vol. 42 (1948), p. 727. The court found that "Best was willing, even eager, to play the Nazi game," and held that "it is of no consequence that he may have thought it was for the ultimate good of the United States to lose World War II, in order that Hitler might accomplish the destruction of an ally of the United States whom Best regarded as a potential enemy."

police power, have extended federal criminal jurisdiction to acts committed on board an airplane owned by an American national."

War—enemy property controls

KOTOHIRA JINSHA *v.* McGRATH. 90 F. Supp. 892.

U. S. District Court, Hawaii, June 5, 1950. McLaughlin, D. J.

Plaintiff Hawaiian corporation, which had operated a Shinto shrine in Hawaii prior to December 7, 1941, sought under § 9 of the Trading with the Enemy Act to recover its property which had been vested in 1948 by the Alien Property Custodian. Finding that "the evidence does not establish any Japanese governmental control, direct or indirect, of this plaintiff, nor any direct or indirect doctrinal or financial control by any state shrine in Japan," the court held that plaintiff was not precluded from having its property returned, by reason of any "enemy taint" due to similarity of its teachings with those of Japanese Shintoism. The court held that at least after the Japanese Government was divested in 1945 of control over Shintoism in Japan, all possibility of enemy control of plaintiff had ceased. The court said:

The undisguised fact is that this plaintiff's property was vested—taken away—because what plaintiff believes in was disliked or suspected, and by taking away its base of operations, its fervor for its beliefs would tend to diminish and eventually vanish. . . .

We have not yet come to the point—nor will we ever while "this Court . . . sits"—where the Government can take away a person's property because it does not approve of what that person believes in or teaches by way of religion or philosophy of life. The First Amendment forbids.¹

¹ In *Schill v. McGrath*, 89 F. Supp. 339 (S. D. N. Y., Feb. 20, 1950), a German who had come to the U. S. in 1904 and who was naturalized in 1949, was denied return of his property vested by the Alien Property Custodian in 1943. The court relied on § 39 of the Trading with the Enemy Act (50 U. S. Code, App. § 39), added in 1948 in connection with the war claims program to use German and Japanese private property as a means of satisfying American claims, which provided that no property or interest therein of German or Japanese nationals which had been vested "shall be returned to former owners thereof." Subsequent acquisition of American citizenship did not aid plaintiff, though the possibility of administrative relief at the discretion of the Custodian was suggested.

Also denying relief under § 39 to one who came from Germany to Hawaii in 1896 but who did not apply for citizenship until 1949 and who was detained against his will in Germany while there on a visit at the outbreak of the war, see *Guessefeldt v. McGrath*, 89 F. Supp. 344 (D. C., Dist. Col., March 14, 1950).

Also involving enemy property and the Alien Property Custodian, see *Beck v. McGrath*, 182 F. (2d) 315 (Ct. App. 2d, May 19, 1950); *McGrath v. Dravo Corp.*, 183 F. (2d) 709 (Ct. App. 3d, July 26, 1950); *Kroll v. McGrath*, 91 F. Supp. 173 (D. C. Dist. Col., April 4, 1950); *Duisberg v. U. S.*, 89 F. Supp. 1019 (Ct. Cls., June 5, 1950); *McGrath v. Ward*, 91 F. Supp. 636 (D. Mass., June 27, 1950); *McGrath v. E. J. Lavino & Co.*, 91 F. Supp. 786 (E. D. Pa., July 13, 1950); *Bunsen v. Davis*, 220 Pac. (2d) 653 (Wash., July 10, 1950).

Military occupation—crime by soldier's wife

MADSEN v. KINSELLA. 93 F. Supp. 319.

U. S. District Court, S. D. W. Va., Sept. 8, 1950. Moore, D. J.

The American wife of an American army officer serving in Germany killed her husband there in 1949, and in 1950 was convicted by an American court¹ in Germany of murder under German law, being sentenced to imprisonment in the United States. Her petition for release on habeas corpus, on the grounds that the court lacked jurisdiction, and that she could not be tried for violation of German law or without the constitutional safeguards for criminal trials, was rejected. The court traced the history of Allied occupation in Germany and of the Military Government courts, pointing out that though "the Occupation Statute restored full judicial powers to the German people subject to certain reserved powers which embraced the protection, prestige, security and immunities of Allied Forces and dependents," laws of the Allied High Commission had specified that German courts should not exercise criminal jurisdiction over Allied Forces, including members of their families. The court said:

The Constitution of the United States is the supreme law of the land, in war as well as in peace. However, its guaranties have no extra-territorial scope. When an American citizen (not a member of the Armed Forces) enters a foreign country, he becomes amenable to the laws of that country, and is triable by its courts, whose procedure may or may not be in conformity with American concepts of justice and fair play.

It may happen, as was the case with Germany, that unconditional surrender to a conquering army completely wipes out local sovereignty, leaving the territory of the conquered nation, pending a treaty of peace, without any body of enforceable law save that which may be imposed by the conqueror. The power, as well as the duty, then devolves upon the conquering nation, through the commander-in-chief of its occupying army, to provide a government to take the place of that which has been overthrown. One of the essential functions of this substitute government is to enact or adopt and administer a body or code of criminal laws. Historically and according to the law of war this is accomplished through decrees of the military commander-in-chief, establishing the law, framing the system of courts, prescribing rules of procedure, and appointing the judges.

The power of the United States thus to govern conquered and occupied country does not stem from any explicit provision of the Federal Constitution. It is, however, implicit in the words of that instrument which make the President the commander-in-chief of the army and navy. . . .

To establish and maintain civil government in a conquered country is certainly a function which grows out of the power to wage war. The

¹ First called United States Military Government Court for Germany, which name was changed to United States Court of the Allied High Commission for Germany, Fourth Judicial District.

situation in Germany is unusual in that the occupation has lasted more than five years; there is still no treaty of peace; and the occupying force still exercises all governmental functions which have not been restored to the German people by the Occupation Statute of September 21, 1949; yet despite this prolongation, the status remains that of a temporary occupation of conquered territory, and the relationships of all persons within its boundaries are fixed and determined by the law of war.

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As to petitioner's complaint that she was deprived of certain rights guaranteed by the Bill of Rights of the United States Constitution, it is sufficient to say that the law has long been settled that these guaranties do not apply to citizens of the United States living or sojourning in a foreign country who are brought to trial in that country on charges of violating local laws. . . .²

International organizations—immunities—arbitration clauses

INTERNATIONAL REFUGEE ORGANIZATION *v.* REPUBLIC S.S. CORP. 93 F. Supp. 798.

U. S. District Court, Maryland, Oct. 30, 1950. Coleman, C.J.

The International Refugee Organization, as a specialized agency of the United Nations, brought a libel *in personam* in admiralty against defendant Panamanian corporation for breach of a charter agreement under which defendant was to supply a vessel for use by plaintiff. The charter agreement contained provisions that "any dispute arising" under it should be referred to arbitration in London, and that "The interpretation of the agreement shall be governed by the law of England." The court decreed that the arbitration provisions were valid, and stayed all proceedings pending arbitration pursuant thereto. In addition to the general reasons in favor of arbitration provisions in maritime contracts, the court said that here:

Without arbitration, Republic has no remedy in the United States because I.R.O. is immune from suit in this country by the International Organizations Immunities Act, 22 U.S.C.A. Sec. 288a (b), unless I.R.O. is to be considered as having waived this immunity by bringing the present suit, which is at least open to doubt, depending upon whether I.R.O. is to be considered an agency of a foreign sovereignty immune to an affirmative judgment without its express consent. See *Kingdom of Roumania v. Guaranty Trust Co.*, 2 Cir., 250 F. 341, certiorari denied 246 U.S. 663. Thus the arbitration clause in the present charter is vitally important to Republic. . . . Nor is this court advised as to whether I.R.O. is subject to suit in England. But the fact that the charter provides . . . that it shall be interpreted according to the

² Citing *In re Ross*, 140 U. S. 453, involving extraterritorial jurisdiction of the United States in Japan; and *Dorr v. United States*, 195 U. S. 138, and *Balzac v. People of Puerto Rico*, 258 U. S. 298, involving territory under American sovereignty but not yet "incorporated" into the United States.

law of England is a further, logical reason for providing for arbitration in London. While this court cannot compel arbitration there or anywhere else, it can and should stay proceedings until it does take place.

Foreign confiscatory decrees—refusal to recognize

ZWACK v. KRAUS BROS. & Co. 93 F. Supp. 963.

U. S. District Court, S. D. N. Y., Nov. 2, 1950. Medina, D. J.

Plaintiff as a partner sued, on behalf of a Hungarian partnership owning American trademarks for beverages, defendant American company which in 1933 had entered into a contract with the partnership to be its exclusive American distributor until 1960. Plaintiff alleged that in 1948 the Hungarian Government had confiscated the partnership's Hungarian factory without compensation and continued to use the old trademarks. Plaintiff sought to prevent trademark infringement, or payment by defendant to those placed by the Hungarian Government in charge of the partnership business. Defendant's motion to dismiss, because the Hungarian Government and persons in Hungary were indispensable parties, was denied. Judge Medina held that the evidence of any contractual basis for Hungarian Government interest was too insubstantial to warrant dismissing the suit, and that:

If the claimed contractual interests are insubstantial, the interests possibly derived from confiscation . . . are even more so. Our courts do not recognize the confiscatory acts of foreign governments when those acts purport to affect property which was not within the territorial jurisdiction of that government, unless a national policy of the United States Government requires that such extra-territorial effect should be given. *United States v. Pink*, 1942, 315 U.S. 203. . . . The property here in suit was at all times within the United States and no national policy requires this Court to recognize the validity of its confiscation by the Hungarian Government.

Lend-Lease—patent protection

STRATFORD DEVELOPMENT CORP. v. UNITED STATES. 93 F. Supp. 610.

U.S. Court of Claims, Nov. 7, 1950. Madden, J.

Plaintiff sued the Government for breach of a licensing agreement for use of certain patents and technical "know-how" necessary for their use in a petroleum-treatment process, which the United States had made available to the Soviet Government under Lend-Lease. Under plaintiff's contract a lump-sum royalty was paid plaintiff for the privilege of use and operation of the plant by the U.S.S.R. for 18 months from the commencement of operation of the plant. The contract gave the Government the right to extend the license after such time, or to terminate. The plant started operation in Russia September 5, 1946, and on March 6, 1947, the United States notified plaintiff that it had elected not to extend the license, having previ-

ously notified the Soviet Government that its right to use the processes under Lend-Lease would expire March 5, 1948. Neither the Soviet Union nor the United States had paid any royalty for use by the Soviet plant since that date. Under Section 7 of the Lend-Lease Act it was required that the American Government agency involved "shall in all contracts or agreements . . . fully protect the rights of all citizens of the United States who have patent rights in and to any such article or information." In the Lend-Lease Agreement with Russia it was agreed that:

If as a result of the transfer to the Government of the U.S.S.R. of any defense article or defense information, it becomes necessary for that Government to take any action or make any payment in order fully to protect any of the rights of a citizen of the U.S.A. who has patent rights . . . , the Government of the U.S.S.R. will take such action or make such payment when requested to do so by the President of the United States of America.

Finding that there was no breach of contract by the United States, the Court rejected the contention that Congress by Section 7 of the Lend-Lease Act required the Government to indemnify plaintiff against the Soviet Union's default. It said that Congress

required, what was really the only practical thing to do in the circumstances, that the Government take from the Soviet Union its promise to pay the plaintiff royalties if it continued to use its patents after the termination of Lend-Lease. . . . Congress would naturally have expected that these allies of ours would, after the war, do what they had agreed to do and would hence have regarded the taking of their promises as a sufficient guaranty of performance.

The plaintiff, when it licensed our Government to ship its patented devices and disclose its "know-how" to Russia, was as fully aware as was our Government that there were no means, other than diplomatic, to induce or compel the Soviet Union to do what it agreed to do. The findings show that our Government has done all that could usefully be done by those means, though its efforts have borne no fruit.¹

Sovereign immunities—foreign state plaintiff and attachment bond

FUCHS v. HARTFORD ACCIDENT & INDEMNITY Co. 93 F. Supp. 926.

U. S. District Court, S. D. N. Y., Nov. 14, 1950. Goddard, D. J.

Defendant issued a bond in support of an attachment of plaintiff's property obtained by the Republic of Poland. After the attachment was vacated, plaintiff sued on the bond to recover disbursements in getting the attachment vacated. Defendant contended, *inter alia*, that there was no consideration for its suretyship obligation, since Poland as a friendly foreign sovereign was not required to post an attachment bond, and that Poland was an indispensable party to this suit. Rejecting these defenses, the

¹ See also *Aktiebolaget Bofors v. U. S.*, 93 F. Supp. 131 (Dist. Ct., Dist. of Columbia, Oct. 10, 1950).

court held that under New York procedure a foreign sovereign is not exempt from furnishing security, saying in part:

Defendant asserts that the failure of New York State to extend exemption to a friendly foreign sovereign is in contravention of international law. Perhaps this would be true if New York were to adopt procedures prejudicial to a foreign sovereign choosing to utilize her courts. But, with reference to procedural requirements applicable generally to all litigants, the foreign sovereign, in electing to sue, must be considered to have accepted the rules of the forum. . . . Accordingly, the Republic of Poland did not act gratuitously in providing security in connection with its attachment warrant. . . .

Where the principal is not a sovereign, action may be brought directly against the surety on his undertaking, but the principal is deemed to have a sufficient interest in the subject matter to entitle him to intervene. . . . Those authorities cited by defendant are not persuasive that a special criterion of indispensability applies to sovereigns, or that the rule should be altered in favor of the foreign sovereign in this case. The Republic of Poland is not bound by the action to any greater degree, nor is more interested, than would be a private principal.

Were the sovereign to be excepted from the general rule, plaintiff would be without recourse unless the Republic of Poland voluntarily joined in the suit. It seems sufficient protection to the sovereign that, if it be so disposed, it may intervene in the action as a party defendant . . . it appears eminently proper not to consider the Republic of Poland an indispensable party to this suit.

Immunities of foreign armed forces or civilian army employees
CHOW HUNG CHING v. THE KING. 77 Commonwealth L.R. 449.
Australia, High Court, December 6, 1948.

Appellants were two Chinese laborers among a body of 300 Chinese nationals sent from China to Manus Island (in the Australian Mandated Territories) to collect war surplus goods sold in 1946 by the United States Government to the Chinese Government. These laborers were subject to Chinese military law and military discipline, and were under the control of Chinese Army officers. Appellants were convicted of assaulting a native while they were off duty, and appealed on the ground that they were immune from prosecution in the Australian courts because they were members of the armed force of a friendly foreign Power admitted with the consent of the Australian Government to territory under Australian jurisdiction. The High Court unanimously denied their appeals, finding that they were not members of a foreign armed force, but at the most civilian employees of the Chinese Army; any immunity was limited to those who were themselves members of the armed force, even though they might be noncombatants.

In the course of his opinion, Latham, C. J., said:

International law is not as such part of the law of Australia . . . but a universally recognized principle of international law would be applied by our courts. . . .

Where the rule with respect to armed forces applies as part of the municipal law it would give some degree of immunity from local jurisdiction. But there is a considerable conflict of opinion between authorities on international law as to the extent of the immunity given.

. . . it has not been satisfactorily demonstrated that a general exemption from the application of local criminal law is implied in the permitted presence of foreign armed forces within Australia, though there is an implied exemption from such provisions of our law as are inconsistent with the existence of the force as an armed organized force: e.g., . . . if a foreign force is admitted to the country there must be an implication that any restrictions which would otherwise be applicable under immigration laws are waived, and that the members of the forces will not be subject to prosecution for carrying arms in breach of local law. . . . In a particular case the circumstances may warrant further implications. . . . There is general agreement that in matters of discipline and internal administration the foreign force is exempt from the jurisdiction of local courts. There is no general agreement that the exemption extends any further, and the weight of authority in Australia, Great Britain and Canada is that no wider principle has been clearly established as part of the municipal law to be recognized and enforced by the courts.

Starke, J., emphasized the point that the immunities of a foreign armed force "must be traced up to the consent of the Commonwealth," flowing "from a waiver" of the Commonwealth's "full territorial jurisdiction," and that "in the case of armed troops the waiver must be express and will not be implied."

Dixon, J., felt that the immunity did not depend upon a rule of international law, but upon a grant or concession by the territorial sovereign. He found that a rule of immunity in favor of friendly visiting troops did exist as a part of Australian law, but that it did not extend far enough to cover this case. He said:

a complete immunity from arrest and imprisonment for offences committed against civilians by a member of the visiting forces while off duty and mixing with the ordinary inhabitants of the country is not to be implied from a bare permission to enter for their own purposes given by the Crown to the forces of a friendly foreign power in time of peace.

McTiernan, J., believed that any immunity was confined to "an organized body armed for war," and that the sovereign of the territory could destroy the implication of waiver of territorial jurisdiction, as had here been done by prosecution by the Crown. Williams, J., believed that the questions relating to immunity of foreign armed forces did not arise, since these men were not part of such a force, and that no opinion should be expressed on the immunities of foreign forces.

Military occupation—occupation currency

DOOLLY v. CHAN TAIK.*

Supreme Court of the Union of Burma, June 29, 1950.

During the Japanese occupation of Burma suit was brought to redeem certain property from an equitable mortgage created in 1941, plaintiff depositing Japanese military notes in court in full payment March 8, 1945. On the basis of this deposit the City Court of Rangoon on April 23, 1945, made a final decree for redemption. After re-occupation of Rangoon by forces of the lawful government, the High Court allowed an appeal by defendant and held that payment into court in Japanese military notes did not suffice. Plaintiffs appealed, but the Supreme Court affirmed the judgment of the High Court, saying in part:

[appellants' counsel] claims that the enemy in occupation of Burma between the years 1942 and 1945 could have imposed on the inhabitants of the country, so long as the occupation lasted, the obligation to recognize the Japanese Military notes at their face value for use as media of exchange and that the appellants, so long as the occupation lasted, could have claimed as against the defendant that these notes which they were depositing in Court were worth their face value. This ingenious contention, however, does not help the appellants to surmount the difficulty inherent in such Japanese Military notes not being lawful money. They were no better than tokens which were given and had value as media of exchange so long as the occupation lasted. A Full Bench of the High Court of Judicature in *Ko Maung Tin v. U Gon Man*¹ held that Japanese Military notes were documents with a value in exchange for goods, and had thus a purchasing value. Four of the five Judges held that Japanese Military notes never formed part of the currency system in Burma and was not "money". . . . Nothing has been said before us on behalf of the appellants to justify our dissenting from the view held by the Full Bench of the High Court of Judicature. With the reoccupation of Burma by the lawful government Japanese Military notes became worthless and were not recognized by the lawful government as having any value after the re-occupation. If, then, Japanese Military notes were not "money" the deposit into the City Court of Rangoon of these notes on the 8th March 1945 cannot, in itself, have the effect of discharging the obligation under the mortgage.

True it is that if following the deposit into Court such deposit had been accepted by the defendant, such acceptance may . . . by reason of section 4 of the Japanese Currency (Evaluation) Act, 1947, have the effect of releasing the plaintiffs from their liability. . . . But we see no justification for extending the rule to cover a deposit into Court. . . .

It is not relevant to the enquiry that so long as military occupation lasted, the military commander could have by exercise of irresistible

* Ms. Opinion made available by E. Maung, Chief Justice, who with Maung Thaung Sein and On Pe formed the court rendering this opinion.

¹ 1947 Ran. 149. [Footnote by the court.]

force compelled acceptance of military notes at their face value. To contend . . . that the City Court of Rangoon on the 8th March 1945 could not have, without laying itself open to such pains and penalties as were held out by the military ordinance relating to military notes, refused the deposit of such notes in Court is to beg the question. Inherent in the contention is the proposition, which we have rejected, namely, that the military commander could have validly imposed a parallel currency system and equated such currency to the lawful currency of Burma.

Prize law—enemy flag conclusive, despite Allied ultimate beneficial ownership

THE UNITAS. 1 Lloyd's Pr.C. (2d) 277, [1950] 2 All Eng. L.R. 219.

Great Britain, Privy Council (In Prize), May 8, 1950. Lord Porter.

1167. The *Unitas* was a whaling factory-ship, registered as a German vessel and flying the German flag, which was captured by Allied forces in a German port after the German surrender in 1945 and was condemned in prize as an enemy vessel. 1 Ll.Pr.C. (2d) 247, [1948] 1 All Eng.L.R. 421, this JOURNAL, Vol. 42 (1948), p. 952. (Claimant Dutch companies appealed on the ground that the Dutch companies owned, through Dutch and German subsidiaries, the entire capital stock of the German company, owning the vessel, and controlled the German company entirely from Rotterdam. The Dutch companies had extensive interests in Germany prior to the war, and in order to get some return from them despite German exchange controls, arranged in 1936 for the construction in Germany of a German whaling fleet, including this vessel. The Crown maintained that condemnation as prize was justified because the *Unitas* flew the German flag and because legal title was in the German company. Appellants contended that the *Unitas* had been placed under the German flag under duress, and that therefore the flying of an enemy flag was only *prima facie* ground for condemnation, subject to exceptions covering the present case. Appellants further contended that the Prize Court should look "behind the legal façade and determine where the true ownership" lay, insisting that this was "in every real and business sense in the beneficial owners") (appellants).

Dismissing the appeal, the court said that "the flying of the enemy flag alone is in this and in most cases sufficient to dispose of the matter at issue," and refrained from passing upon the other arguments presented. The economic pressure brought to bear on appellants by Germany in connection with their German operations was held insufficient to reject the conclusiveness of flying the German flag. Lord Porter said in part:

It does not, in their Lordships' view, assist the appellants' case to speak of the building of the whaling fleet and its German registration and chartering to a German company as involuntary. In truth, it was not involuntary in the sense of being unintentional: it was a deliberate

choice taken between two distasteful alternatives. It was only involuntary in the sense that the appellants would have preferred not to make a choice at all. Faced with the obligation of doing so, they made their election. And it is not irrelevant to remember that election was made two years before war broke out, and, though no accounts have been furnished and possibly none could be furnished, yet the ship was built in time to perform a whaling voyage at any rate in 1938 and may well have earned considerable emoluments for her owners. (The fact that she was built as a result of German pressure and German threats because a worse fate might have befallen the claimants if they did not give way seems to their Lordships a totally inadequate reason for avoiding the natural consequence of flying the German flag.)

Their Lordships accept the view that there may be circumstances which make the flying of the enemy flag inconclusive as a reason for condemning a ship in Prize, but such circumstances must be very exceptional. . . .

The only such cases found by the court were *The Vrow Elizabeth*, 5 C. Rob.2 (1803), and early cases discussed therein; *The Palme*, Dalloz, *Jurisprudence Générale*, 1872, III, p. 94; *The Taxiarchis*, mentioned in II Wheaton, *International Law* (7th Eng. ed.), p. 153, along with *The Palme*; and *The Pontoporos*, 1 Br. & Col.Pr.Cas.371. *The Palme* was a German vessel purchased by the Swiss Red Cross from German owners; the Swiss and French governments forbade the use of their flags and it therefore retained the German flag, which was thus held not conclusive of its enemy character. *The Taxiarchis* was British-owned and registered in Cyprus, then under nominal Turkish rule but actual British administration; there being no flag of Cyprus, she flew the Turkish flag, which was not held conclusive of her enemy character. *The Pontoporos* was a Greek ship captured by a German raider and used by it as a coaling auxiliary, though her master never consented to such use and was kept a prisoner. The court said: "The case is a true example of involuntary submission to enemy duress." Once this conclusion was reached, the court added: "It is, as a general rule, where captors are concerned, the use of the enemy flag which entitles them to seize. Neutral ownership of itself does not protect the ship."¹

Immunity—property of foreign governments or international agency
DOLLFUS MIEG ET CIE., S. A. v. BANK OF ENGLAND. [1950] 2 All Eng. L.R.605.

England, High Court, Chancery Div., July 20, 1950. Wynn-Parry, J.

The court granted the application of the United States and France to be made defendants after the Court of Appeal, [1950] 1 All Eng. L.R. 747,

¹ See also *The Coburg*, 1 Ll. Pr. C. (2d) 286 (High Ct., March 17, 1950), condemning as prize the proceeds of goods taken from a German vessel found scuttled on the surrender to British forces of the African port of Massowah in April, 1941.

this JOURNAL, Vol. 44 (1950), p. 592, had reversed the decision of this court, [1949] 1 All Eng. L.R. 946, this JOURNAL, Vol. 44 (1950), p. 204, that the Bank of England was immune to suit as bailee of certain gold bars deposited with it by the Tripartite Gold Commission (composed of representatives of the United States, France and Great Britain) and alleged to have been seized from the plaintiff French company by the Germans and later recovered by American forces. According to the court, the true test whether the applicants had a proprietary right in the subject-matter sufficient to entitle them to be joined as defendants depended upon the effect on the subject-matter if their rights were established. Although applicants did not claim title to the gold bars, if the right to possession claimed by the United States and France were sustained and were coupled with the doctrine of sovereign immunity from suit, the United States and France would, for all practical purposes, be the owners so far as the plaintiff was concerned. Therefore the applicants had a proprietary right in the subject-matter sufficient to entitle them to be joined as defendants.

Consular immunities—official acts

THUREAU DANGIN *v.* PATURAU. Mauritius Reports, 1949, p. 160.

Mauritius, Supreme Court, Sept. 14, 1949. Brouard and Osman, JJ.

Plaintiff French national domiciled in France sued defendant, appointed French consul in Mauritius for the Provisional Government of France in May, 1944, for damages due to his refusal to issue her a passport for which she applied July 25, 1945. Defendant consul at first insisted that plaintiff sign a letter recognizing the authority of the Provisional Government of France, but on November 23, 1945, finally issued her a passport without her signing such a letter. The court accepted defendant's plea that it had no jurisdiction to determine an action brought against him for these acts performed in the discharge of his official duties. Relying upon international law treaties and decisions of the French courts regarding consular immunities, Brouard, J., said:

it appears that Consuls, although not entitled to the privileges of personal immunity enjoyed by the diplomatic service, are, nevertheless, according to international courtesy and usages, granted a certain protection when acting in their official capacity.

That protection, according to the learned authors, seems to be based on reciprocity. I find . . . that the British Consuls in France have already been granted that "*immunité de juridiction*" when acting in performance of their official duties.

Further, it seems logical that if "muniments and papers of a consulate are inviolable," consuls should not be requested to explain before a foreign court acts done by them under instructions in the performance of their official duties.

Brouard, J., further pointed out that the British Foreign Secretary had stated that defendant's appointment and recognition as French consul "entitles him to immunity from legal process in respect of any act committed by him in the exercise of his official functions."¹

AMERICAN CASES ON NATIONALITY AND ALIENS

In *Cabebe v. Acheson*, 183 F. (2d) 795 (Ct. App. 9th, June 23, 1950) the court held, in an action for declaratory judgment as to nationality, that a person born in the Philippines in 1910, who had resided in Hawaii since 1930, was not a national of the United States and not entitled to an American passport permitting him to enter Guam. During the period of American control over the Philippines he became an American national but not an American citizen; with the termination of American sovereignty and the independence of the Philippines his nationality ties with the United States ended, unless he became naturalized as an American citizen. Despite any clear statement in statute or the treaty with the Philippines, the court concluded that "the United States government intended the status of Filipinos, regardless of domicile or place of residence at the date of Philippine independence, to be entirely separate from any phase of adherence to the United States."

In *McGrath v. Kristensen*, 340 U. S. 162 (Dec. 11, 1950), the Court affirmed the decision reported in 179 F. (2d) 796, this JOURNAL, Vol. 44 (1950), p. 594, holding that a Danish national, who had come to the United States in August, 1939, and had been unable to depart because of wartime conditions, was not "residing" in the United States for purposes of liability to military service. He therefore did not become ineligible to citizenship by filing a claim for relief from application of the Selective Service Act.

Petition of Moser, 182 F. (2d) 734 (Ct. App. 2d, June 14, 1950) reversed a decision, 85 F. Supp. 683, this JOURNAL, Vol. 44 (1950), p. 196, which had conferred naturalization on a Swiss officer who in 1944 sought

¹ Concurring, Osman, J., said: "The English commentators are by no means clear as to the extent of the privileges accorded to consular officers, but they do not appear to extend to consuls the immunity from legal action, although there is no reported case where such immunity has been refused to a consul in England for an act done in the exercise of his functions. On the other hand, the French authors and Courts admit in unambiguous terms the exemption from local jurisdiction in respect of acts done by a consul in the execution of his official duties.

"I have reached the conclusion that the principle of exemption from local jurisdiction enunciated by French commentators and applied by the French Courts is a sound principle which should find its application in this Colony as that principle is based on reciprocity and international courtesy. I hold this opinion independently of the advice tendered by the Foreign Office that the fact that defendant was appointed to act as consul in 1944 entitled him to immunity from legal process in respect of any act committed by him in the exercise of his official functions."

exemption from American military service in reliance on the Convention of Nov. 25, 1850, between the United States and Switzerland. The Court of Appeals held that this action, taken by one who had previously petitioned for naturalization as the spouse of a citizen, rendered petitioner ineligible for naturalization. The court said that though the treaty gave him immunity from military service, it did not require him to take advantage thereof; and that "the treaty is silent on the subject of the acquisition of citizenship by nationals of either country residing in the other." Consequently the statute barring neutral aliens from naturalization if they had sought draft exemption did not contravene the treaty; if it had, the statute, being later in time, would prevail. The court found no "estoppel" against the Government, such as the District Court had suggested, but added that the present was "an appealing case for legislative action."

In *Application of Aguirre*, 90 F. Supp. 668 (S.D.N.Y. May 24, 1950), the court followed the reasoning of *United States v. Camean*, 174 F. (2d) 151, this JOURNAL, Vol. 44 (1950), p. 187, and held that naturalization should be granted to seamen who served five years on vessels owned by a Panamanian corporation wholly owned by an American corporation, though documented under Panamanian law and having under these documents a "home port" in Panama. The vessels normally returned to the United States between voyages, and the purpose of the provision was satisfied by exposure of the petitioners to "a scrutiny which is the measurable equivalent of actual residence."

Sodo v. United States, 94 N.E. (2d) 325 (Illinois Sup. Ct., Sept. 21, 1950), reversed a decision of a State court admitting petitioner to citizenship in 1949, after he had made an affidavit that he had been arrested only four times, the last time being in 1941, since on the hearing he admitted having been arrested a total of 14 times between 1924 and 1942. Even though none of these arrests came within the five years prior to his naturalization, the Illinois Supreme Court held that his false affidavit was itself evidence of lack of good moral character, and required denial of naturalization. It was shown that in 1938 and 1942 petitioner had been refused naturalization because of false swearing as to the number of times he had been arrested.¹

In *re Markiewicz*, 90 F. Supp. 191 (W.D. Pa., April 5, 1950), refused naturalization to a person who had resided in the United States since 1913, who had been ordered deported in 1933 on grounds of membership in the Communist Party, but whose deportation to Russia or Poland could not be carried out because of passport difficulties, and who at various times between 1929 and 1945 had engaged in acts of misconduct with members of the feminine sex. Although the outstanding order of deportation did not

¹ On "attachment to principles of the Constitution," and refusal to bear arms, see *Tauchen v. Barber*, 183 F. (2d) 266 (Ct. App. 9th, June 30, 1950).

prevent naturalization nor terminate the legality of his residence, petitioner was held not to be a person of good moral character. Gourley, D.J., said:

Although the Naturalization Statute says nothing about the necessity for a petitioner to be of good moral character prior to the beginning of the five-year period, I do not believe it was intended that an applicant for citizenship should be permitted to draw an iron curtain across any part of his past.²

In *Petition of Chin Lee*, 91 F. Supp. 550 (D. Hawaii, July 3, 1950), a Chinese-born honorably discharged veteran of American Armed Forces had come to the United States on a visitor's visa, the last extension of which expired in December, 1946. He petitioned in 1949 for naturalization, under Section 324A of the Nationality Act, as an honorably discharged service man. The petition was denied on the ground that petitioner was not lawfully in the country.

For purposes of Section 201 (g) of the Nationality Act conferring citizenship on children, one of whose parents was a citizen of the United States who prior to the child's birth "has had ten years' residence in the United States," it was held that such residence was not interrupted by two visits to China; eight and one-third years of actual residence, during the period of twelve years for which the United States was "the place of general abode" of the father, sufficed. *Acheson v. Yee King Gee*, 184 F. (2d) 382 (Ct. App. 9th, Oct. 4, 1950).

In *Finucane v. Bindczyck*, 184 F. (2d) 225 (Ct. App., Dist. Col., June 19, 1950), a Maryland court was held to have the right to vacate and set aside a judgment of naturalization it had given seven days before, the procedure for denaturalization under 8 U. S. Code, sec. 738, not excluding such action by the naturalizing court.³

Hatsuye Ouye v. Acheson, 91 F. Supp. 129 (D. Hawaii, May 12, 1950), held that an American-born citizen of Japanese ancestry residing in Japan had not been expatriated by voting in April, 1946, in a Japanese general election conducted under the American military occupation; she was held to have been induced to vote by the American military authorities, social

² Holding that "good moral character" must be shown only for the three-year period of military service when expedited naturalization of an alien soldier takes place under Section 324A of the Nationality Act, see *Yuen Jung v. Barber*, 184 F. (2d) 491 (Ct. App. 9th, Oct. 4, 1950). In *Molsen v. Young*, 182 F. (2d) 480 (Ct. App. 5th, May 26, 1950), petitioner's lack of "attachment to the principles of the Constitution" prior to the five years immediately preceding naturalization was held relevant, but this judgment was vacated and case remanded to the District Court, 340 U. S. 880 (Nov. 13, 1950).

³ Denaturalization cases included *Ackermann v. U. S.*, 340 U. S. 193 (Dec. 11, 1950); *Klapprott v. U. S.*, 183 F. (2d) 474 (Ct. App. 3d, July 20, 1950); *U. S. v. Bridges*, 90 F. Supp. 973 (N. D. Calif., June 16, 1950); *U. S. v. Zurini*, 93 F. Supp. 1 (D. Neb., Oct. 16, 1950).

pressures, and fear of loss of rations.⁴ In *Brehm v. Acheson*, 90 F. Supp. 662 (S. D. Texas, April 25, 1950), an American-born wife of a German national, who had lived in Germany since 1932, was held not to have expatriated herself by voting in a German city election in 1946 in the American Zone of Occupation. Holding that "the area in which the election was held was not a foreign state or territory" within the meaning of 8 U. S. Code, sec. 801 (e), the court said that the election "at which plaintiff voted, was held in territory then ruled and governed by the United States and was held by permission and under the direction and by the authority of the United States." In *Kanno v. Acheson*, 92 F. Supp. 183 (S. D. Calif., June 23, 1950), an American-born son of Japanese parents taken to Japan in 1923, who was conscripted by the Japanese Army in 1943 after efforts to return to the United States in 1939 and to avoid Japanese military service, was held not to have lost American citizenship, since his entry into and service in the Japanese Army "were involuntary and were under duress and compulsion." However, in *Zimmer v. Acheson*, 91 F. Supp. 313 (D. Kansas, June 30, 1950), the German-born son of a German who had become naturalized as an American citizen and then had returned to Germany, was unable to show that his military service in the German Army from 1940 until 1945 or oath of allegiance to Germany was involuntary. The court expressed some doubt whether he had already lost American citizenship through failure to "elect" it by his actions in the fourteen years between coming of age and induction into the army. In *Ponce v. McGrath*, 91 F. Supp. 23 (S. D. Calif., June 19, 1950), the court held that a boy born in the United States and taken to Mexico when three years old had, in view of the evidence, not lost citizenship under section 401 (j) of the Nationality Act by remaining outside the United States "for the sole purpose of avoiding United States military service."⁵

In *Di Iorio v. Nicolls*, 182 F. (2d) 836 (Ct. App. 1st, June 9, 1950), petitioner, who had lost American citizenship by voluntary service in the Italian Army, was permitted to claim the benefits of simplified and accelerated renaturalization under Section 317 (c) of the Nationality Act, upon lawful entry into the country on a visitor's visa, entry as an immigrant not being required.

In *U. S. ex rel. Frisch v. Miller*, 181 F. (2d) 360 (Ct. App. 5th, April 7, 1950), the Administrative Procedure Act was held inapplicable to proceedings for exclusion or admission of aliens. Stay of deportation proceedings, pending special legislation to permit the deportee to remain in

⁴ *Accord*, *Kuniyuki v. Acheson*, 94 F. Supp. 358 (W. D. Wash., Aug. 24, 1950); see also *Acheson v. Ishimaru*, 185 F. (2d) 547 (Ct. App. 9th, Dec. 4, 1950).

⁵ Regarding expatriation by residence abroad, see *Acheson v. Particelli*, 184 F. (2d) 938 (Ct. App. 5th, Nov. 3, 1950). On expatriation by marriage to an alien in 1907, and effect of subsequent American naturalization as acquiescence in prior loss of citizenship by such marriage, see *In re Riedner*, 94 F. Supp. 289 (E. D. Wis., Aug. 25, 1950).

the country, was granted in *U.S. ex rel. Picicci v. District Director*, 181 F. (2d) 304 (Ct. App. 2d, March 17, 1950), and *U.S. ex rel. Knauff v. McGrath*, 181 F. (2d) 839 (Ct. App. 2d, March 28, 1950). The right to attack previous deportation orders collaterally was denied in *U.S. ex rel. Steffner v. Carmichael*, 183 F. (2d) 19 (Ct. App. 5th, June 21, 1950). In *U. S. ex rel. DeGeorge v. Jordan*, 183 F. (2d) 768 (Ct. App. 7th, July 10, 1950), the court discusses what are crimes of "moral turpitude" which result in deportation. *U.S. ex rel. Adel v. Shaughnessy*, 183 F. (2d) 371 (Ct. App. 2d, June 26, 1950), involved the discretionary suspension of deportation because of "good moral character"; see also *DeKoning v. Zimmerman*, 89 F. Supp. 891 (E.D. Pa., Feb. 13, 1950). In *Harisiades v. Shaughnessy*, 90 F. Supp. 397 (S.D. N.Y., Feb. 9, 1950), Liebell, D.J., discussed at great length the evidence upon which he found that membership in the Communist Party in the United States from 1925 until 1939 justified deportation of an active Communist Party organizer and official; during the period of his membership and activities the Party was found to have "advocated the overthrow of the Government of the United States by force and violence."⁶

⁶ Regarding bail in deportation cases, see *Warhol v. Shrode*, 94 F. Supp. 229 (D. Minn., Oct. 30, 1950); *Podolski v. Baird*, 94 F. Supp. 284 (E. D. Mich., Nov. 6, 1950); *Ex parte Sentner*, 94 F. Supp. 77 (E. D. Mo., Nov. 9, 1950); *Ex parte Carlson*, 94 F. Supp. 18 (S. D. Calif., Nov. 10, 1950); *Zydok v. Butterfield*, 94 F. Supp. 338 (E. D. Mich., Nov. 10, 1950); *U. S. ex rel. McQuillan v. Delany*, 94 F. Supp. 184 (E. D. La., Nov. 16, 1950); *U. S. ex rel. Klig v. Shaughnessy*, 94 F. Supp. 157 (S. D. N. Y., Nov. 17, 1950). Other procedural questions in deportation arose in *Prince v. Mackey*, 185 F. (2d) 578 (Ct. App. 9th, Nov. 17, 1950); *U. S. ex rel. Wiczynski v. Shaughnessy*, 185 F. (2d) 347 (Ct. App. 2d, Nov. 22, 1950); *U. S. ex rel. Castro-Louzan v. Zimmerman*, 94 F. Supp. 22 (E. D. Pa., Nov. 17, 1950).

Deportation was not stayed to permit completion of naturalization, the 1950 Internal Security Act preventing naturalization if deportation proceedings are pending: *U. S. ex rel. Jankowski v. Shaughnessy*, 93 F. Supp. 7 (S. D. N. Y., Oct. 13, 1950).

BOOK REVIEWS AND NOTES

International Law and Human Rights. By H. Lauterpacht. New York: Frederick D. Praeger, Inc., 1950. pp. xvi, 475. \$8.50.

Probably the most important and constructive contribution to the science of international law during the past year is this book by the Whewell Professor of International Law at Cambridge University. It deals with the revolution which is now taking place in that legal system. The long accepted theory according to which only a state can be a subject of international law becomes more and more inadequate to meet the problems of interdependence in our world. Thinkers in this field have maintained that international organizations on the one hand, and individuals on the other hand, should be regarded as subjects of international law. Among these was Dr. Lauterpacht who, in 1945, promulgated his own "International Bill of the Rights of Man." Since that time have occurred the Nuremburg trials, the Charter of the United Nations, the Declaration and a Covenant now being prepared as a binding treaty—not to mention an enormous amount of discussion and literature.

As a result of these rapid developments, Professor Lauterpacht now gives us a sequel to his former work. His stated purposes are to study the Charter of the United Nations and subsequent developments thereunder, and to relate such steps to the existing body of international law. Part I deals with The Rights of Man and The Law of Nations; Part II, with Human Rights under the Charter of the United Nations; Part III is his own revised International Bill of the Rights of Man.

He denies that the practice of states limits international personality to states, but in this argument he is, as usual, original in his thinking. Piracy, he suggests, is perhaps not really an international crime which an individual can commit (p. 9); on the other hand, under the law of war an individual is the subject of rights and duties, and the doctrine of incorporation (of international law as part of the law of the land) has a similar result. An individual may have rights under international law, even though he has no way to enforce them (p. 27); even when acting as the agent of a state, the individual is the subject of responsibility. According to Duguit, Krabbe, and Scelle (cited at p. 40), individuals are indeed the only subjects of international law; and Lauterpacht suggests that this is good, since it operates against the dualism of moral standards (a point which he notes at various places) which exists when the agent is considered as something different from the individual which he is. The Statute of the International Court of Justice is too rigid in Article 34, but this denial of access to the

individual is purely procedural. The theory upon which it was written is dead, and individuals should be allowed to appear, in ways limited for convenience, before international tribunals. No general rule of international law, he concludes, precludes the acquiring of rights and duties by individuals (p. 61), if states in their practice are willing to confer them. It is much to be desired that states should treat individuals with as much respect as they treat other states.

There follow some seventy pages on the law of nature, the presence of which is justified by the author as follows (p. 74): While the law of nature "can never be a true substitute for the positive enactments of the law of the society of States," nevertheless "they are of abiding potency and beneficence as the foundation of its (law of nations) ultimate validity and as a standard of its approximation of justice." The idea of inherent rights of man, superior even to the sovereign state, is a continuous thread throughout legal and political thought, and it is resurgent and essential today.

Having shown in Part I that the provision for human rights in the Charter is not an artificial innovation or out of keeping with the fundamental purposes of international law, we proceed to study these Charter provisions in Part II. At first sight, he says, it appears exaggerated to describe these provisions as implying legal rights and duties; but Members are under a legal obligation to respect and observe fundamental human rights and freedoms (p. 147). To say otherwise is to deny that treaties must be interpreted in good faith. That these rights are not clearly defined, or that they are not enforceable, does not deprive them of their legal character. There is a mandatory obligation implied in Article 55, and a distinct element of legal duty in Article 56 (p. 148). In this connection, he considers the various cases in United States and Canadian courts (the Fujii case in California was not yet available) and the discussions in the International Law Commission.

This leads into Chapter 10 on Article 2, Paragraph 7, of the Charter. It may incidentally be remarked at this point that this book on human rights is also a very wide and useful commentary on the Charter. The author takes the word "intervene" in this article in the technical meaning of "intervention" and concludes that the Charter does not forbid interference and does not exclude treatment of such matters as human rights (pp. 213-214). He rejects the view of Kelsen and Brunet that each Member may interpret the Charter for itself (pp. 181-182). This chapter contains detailed study of the various cases involving the "domestic questions" clause. One might ask whether the refusal of the Union of South Africa to accept the recommendations concerning Indians therein should be interpreted as defiance, or as assertion of the right of a Member to interpret the Charter for itself.

Dr. Lauterpacht denies the position taken by the Human Rights Commission that it has no power to take action concerning violations of human

rights brought before it; it not only can, but has a duty to do so (p. 228). There can be no effective right of petition, he says, if the petition is not heard and acted upon. He criticizes the Commission also for having broken with the past by distinguishing between the Declaration and a Bill of Human Rights. The Declaration, he asserts, is "without legal force and of controversial moral authority" (p. 279).

In Part III he presents his own "International Bill of the Rights of Man," somewhat revised from his earlier publication. Here are considered such matters as the categories of rights, escape clauses for federal governments (reluctantly conceded), for colonial areas (denied), exceptions for local public order and safety (accepted). Chapter 16 explains article by article the rights proposed in his own draft, and Chapter 17, the implementation proposed. The Bill of Rights is to be adopted as part of domestic law, abrogating any inconsistent statutes. The rights are to be guaranteed by the United Nations; the procedure would be for a Human Rights Council to investigate petitions, with a right to ask an advisory opinion from the International Court of Justice. If its recommendation is not obeyed, the matter would be brought to the General Assembly whose recommendation would, as agreed by parties in advance, be final and legally binding. A final chapter considers the proposed European Court and Commission of Human Rights.

The book ranges much more widely over the field of international and United Nations law than its title indicates. It is profound, erudite, well documented, a really scientific study; it is also radical in its viewpoint, far visioned in its consideration. It does what international lawyers should now be doing, which is to take up new needs and topics in international law and study them in relation to, and as developing from, existing international law.

CLYDE EAGLETON

Völkerrecht. By Alfred Verdross. (Second edition, completely rewritten and enlarged.) Vienna: Springer Verlag, 1950. pp. xviii, 508. Index.

Rather than a second edition of the author's treatise of 1937, the work under review is a new book. It is not only completely rewritten, enlarged, and brought up to date, but newly thought through as to fundamentals and as to every detailed problem. In the relatively small framework of one volume the author has succeeded in giving us a very rich and full system of international law. Writing under the humanly and scientifically difficult conditions of post-war Vienna, the author has, nevertheless, been able to make use of the most recent documents and literature.

The work is divided into three main parts: the foundations of international law, general international law, and the law of the organized community of states.

The laws of war and neutrality are studied only briefly. The experience of the second World War is hardly made use of. The present chaotic status of the laws of war, the reasons therefor, and the problems which pose themselves now are not discussed. To consider economic warfare merely as the law of aliens in time of war is far too narrow. It was not yet possible to work in fully the new Geneva Conventions of 1949.

The third part, treating the United Nations, regional organizations, international administration, and peaceful settlement of international conflicts is excellent, although necessarily brief.

But the primary strength of the work lies in the first part and in the general international law of peace. In this respect the volume is one of the best, finest, deepest, and most original treatments of international law in any language. Obviously the fruit of a life's work, the treatment is not only full of erudition, but the original creation of a deeply learned international lawyer, who is, first of all, a thinker. Methodologically the work fulfils what this writer has been preaching for a long time: the combination of the one-sided Continental and Anglo-American approaches into a new method, based on philosophy, making use of the whole literature in all the great languages, and founded, at the same time, on the most meticulous study of the practice of states and on the case law of national and international courts.

As to its philosophical basis, the author rightly combines the different approaches of modern jurisprudence, analytical, sociological, historical, and axiological. Like Brierly and Ross, Verdross insists on the necessity of investigating the sociological foundations of our international law: the co-existence of a plurality of sovereign states having intercourse *inter se*. The sovereign state is, therefore, presupposed by our international law. This insight opens the way for the investigation of such problems as sovereignty, domestic jurisdiction, for a really correct analysis of the position of the individual in positive international law and—*de lege ferenda*—for the difference between a progressive development of our international law and its replacement by the municipal law of a World State.

The analytical approach, a theory of international law, is equally of the greatest importance. But such theory cannot be built in the abstract. International law must be understood as the concrete law of a particular, concrete community of sovereign states which has come into being historically and sociologically. Hence, the importance of the historical approach. The history of international law and of its science is masterfully traced. Every sentence is based on a deep study of the originals, not upon second-hand knowledge; we point to the paragraphs on Bartolus, Vitoria, Suarez, and Moser. It is particularly valuable that the author also gives us the history and development of each single norm, doctrine, and institution, the "*Dogmengeschichte*," as it is called in German.

International law has not only a sociological but also a normative foundation. Solidly anchored in the realm of facts, it reaches also into the empire of values. It is also determined by certain norms of social ethics, commonly referred to as "natural law." But the author's concept of natural law is thoroughly modern in the sense of the philosophy of values; restricted to certain fundamental principles, imperatively demanding the positive law, it is ethics. That explains that Verdross' work, notwithstanding his insistence upon a general ethical foundation, is thoroughly positivistic, far more so than the work by many an agnostic.

It is on these bases that Verdross presents the general international law of peace. Certainly there are points where this reviewer differs from the author, but it would be pedantic to enumerate these points. This reviewer rather wishes to indicate how far he is in accord with the author. It is impossible to point out in detail the excellence of the treatment of the many single problems. As examples we may mention the chapter on the persons of international law, the fine analytical distinction between territorial sovereignty and mere territorial supremacy, the fine treatment of diplomatic immunities, of the international norms regulating the law of nationality, the historically and dogmatically brilliant chapter on the law of territorial waters.

Verdross rightly insists on the fundamental and lasting importance of general international law, even under the Charter of the United Nations. Not only does this Charter presuppose general international law, but the latter also reappears fully, in case of the non-functioning of the special norms of the Charter. If states resort to Article 51 and if the Security Council remains paralyzed, we are back to the general international law of self-help, limited only by the laws of war. Verdross thus calls Article 51 the "turntable" which, in case the Security Council is not able to function, leads the new law of the Charter back into the bed of general international law.

It is earnestly to be hoped that we will get very soon an English translation of this extraordinary work.

JOSEF L. KUNZ

Diplomaticheskii Immunitet. By D. B. Levin. Moscow and Leningrad: Izdatel'stvo Akademii Nauk SSSR, 1949. pp. xxiv, 415. Rubles 24.

Among the growing number of Soviet publications on international law, based apparently on the assumption of a long period of peaceful co-existence of the Soviet and non-Soviet worlds, Dr. Levin's monographic work on diplomatic immunities must be accorded a prominent place. It contains a serious and rather thorough re-examination and reappraisal of the doctrines and practice of diplomatic privileges and immunities. The political views of the author are, of course, quite evident, particularly in the Intro-

duction, where the nature of diplomacy and alleged fundamental differences between "imperialist" and Soviet diplomacy are discussed. According to the author, diplomacy is both a science and an art, and stands in the same relation to foreign policy as tactics to strategy. The bulk of the work, however, is devoted to more strictly legal matters, although "bourgeois" jurists are criticized for divorcing law from politics. Like many Continental writers Dr. Levin leans toward emphasis on history and doctrine rather than on the *minutiae* of current practice. This is roughly indicated by the number of pages devoted to the four parts of the book: Part I (Historical Development), 124 pages; Part II (Sources of the Law of Diplomatic Immunities), 96 pages; Part III (Juridical Nature of Diplomatic Immunities), 68 pages; Part IV (Classification of Immunities, Problems of Modern Practice), 117 pages. The author is thoroughly conversant with the Western literature and sources of the subject. In addition he makes copious references to Russian sources and publications which are but little known in the West. One is impressed with the number of cited monographic and other works on international law published in Russia both before and after 1917 which are apparently not available in this country.

Dr. Levin's general approach is that of a positivist. As may be expected of a Soviet author, he believes that national legislation plays an important part in the development of international law and may be said to be a source of the latter. Analysis and criticism of the principal theories of the juridical bases of diplomatic immunities (the theory of extraterritoriality, the theory of representation, and the theory of diplomatic functions) are followed by an attempt to construct a new version of the theory of representation. The author believes that the rules of diplomatic immunities can be best based on "the right of legation" (i.e., the capacity to enter into diplomatic relations), which they are designed to protect. The construction is not very convincing, and, in the reviewer's opinion, the author fails to show that it has advantages over the theory of diplomatic functions, which is relegated to the position of a subsidiary aid in determining the content of particular rules. The author stresses the view that his theory would best serve the needs of Soviet practice and doctrine. In this connection he stoutly defends the Soviet claim that the Soviet trade delegations abroad are entitled to diplomatic immunities even in the absence of special agreements to that effect. No claim is made, however, that consular officials and premises also enjoy diplomatic immunities. On the question of the categories of persons entitled to diplomatic immunities, Dr. Levin concurs with Soviet legislation and practice in adopting a restrictive view. After a rather cursory discussion of the problem, he concludes that in modern international law only diplomatic officers and their spouses and minor children are entitled to diplomatic immunities, and that the extension of such immunities to subordinate (administrative and service) personnel of diplomatic missions is a matter of international courtesy.

A prefatory note indicates that a chapter on the immunities of United Nations personnel which formed part of the work in manuscript was published separately in condensed form as an article in *Izvestiia Akademii Nauk SSSR, Otdeleniie Ekonomiki i Prava*, 1948, No. 6.

OLIVER J. LISSITZYN

Diritto Coloniale. By Rolando Quadri. Padova: Cedam, 1950. pp. 159 L. 1000.

Professor Quadri, of the University of Padua, experienced some difficulty in finding an appropriate title for this book. Although he chose the title "Colonial Law" (*Diritto Coloniale*), in the preface he shows that others, perhaps, might have given the subject-matter a different title, such as the law of "Overseas Territories" or "Non-self-governing Territories"—to adopt the terminology of the United Nations. The author preferred, however, to wait for an appropriate title to be given by a "competent tribunal" and, therefore, until such time he prefers to call the subject "Colonial Law."

The book is not a comprehensive treatise on the law governing colonies or non-self-governing territories, but is a study consisting of three chapters dealing with the intricate and difficult problems concerning the existence of the "right" to occupy underdeveloped territories, the nations that may exercise such a "right," and the various forms of government devised for the administration of such territories. Although simple in form, this excellently documented study is a thorough and orderly presentation of the more important problems concerning the control of colonies and other territories.

The main purpose of the book apparently is to discuss and evaluate the various grounds justifying the acquisition of underdeveloped areas and colonial expansion. This is done by a well-documented comparison of the old traditional forms with the newer methods of control. The author shows the underlying conflict of interests among the great Powers in relation to the acquisition and control of underdeveloped or backward areas. He convincingly demonstrates how, in spite of the cloak of a juridical basis for the acquisition and control of the areas, the governing nations are unable to conceal what is in fact a matter of might and international politics.

Chapter I, entitled "Preliminary and Introductory Concepts," consists of definitions and explanations of the concepts involved in Colonial Law and a classification of the various colonial forms.

Chapter II, entitled "Colonial Expansion," being the greater portion of this study, consists of two sections; the first deals with the traditional forms and the second with the more modern forms. This chapter accurately analyzes all of the forms and methods that have been utilized for colonial expansion. Obviously this chapter also involves a discussion of the mandates under the League of Nations and non-self-governing territories under the

trusteeship system of the United Nations. The author criticizes the manner in which these international organizations have coped with the problems of distribution of these backward areas. The author shows that, in spite of anti-colonial sentiment and expressions to the effect that ultimately all people are to be self-governing, the same old considerations involved in power politics basically still determine the distribution made of territories—and this has not changed even under the trusteeship system of the United Nations. The author continues by showing how the high-sounding phrases and idealism so glibly expressed by many statesmen become meaningless in the face of the reality of the desire for colonial expansion and imperialism.

The third chapter deals with the former Italian colonies and the trusteeship of Italian Somaliland. If the book be regarded as containing a syllogism, this chapter obviously would be referred to as the conclusion flowing from the premises expounded in the previous chapters. It is calculated to show that, though the forms have changed and much has been promised to be done about this problem, no true progress has, in fact, been made over the years. The matter of colonization and control of underdeveloped territories is still not a legal question based upon principles of justice and objective morality, but a matter of political expediency determined by considerations of power. The author seeks to show that an injustice was perpetrated in having dealt with the Italian colonies in a harsh manner that failed to distinguish between the Fascist colonies and those colonies that preceded the Fascist regime in Italy. A brutally logical and severe criticism of the "temporary trusteeship" accorded Italy over Italian Somaliland apparently might be the reason that impelled the author to write this book. The illogical and unjust nature of this trusteeship is made evident by the ten-year limitation placed upon the trusteeship at which time the territory will be sovereign and independent. Professor Quadri maintains that to predetermine the time within which a territory will be capable of self-government and hence will acquire independence and self-government is absurd, since the ability is a question of fact and such question cannot be arbitrarily predetermined.

No general overall conclusion is stated concerning the problems of colonization presently confronting the United Nations. It is suspected that the book is in effect a scholarly brief calculated to show the injustice and impropriety of depriving Italy of her pre-Fascist colonies.

EDWARD D. RE

La Comunità Internazionale e il Diritto. By Mario Giuliano. Padova: Cedam, 1950. pp. 367. L. 2500.

The book under review, highly interesting but also highly debatable, belongs to the movement for a sociological science of international law. The always repeated fundamental idea of the book is that it is not the law which

creates order, but the order which creates law (in the sense of Brierly). International law, like all law, is only a product, a superstructure of a certain community. International law is the law of a concrete, historically determined community, namely, of the "entities *superiorem non recognoscentes*." It is an individual, autonomous law, entirely different from municipal law. The science of international law cannot fulfil its task either logically or practically without studying the norms always in the closest connection with a rigorous investigation of social reality in its historical concretization. The "function" of international law is not to determine or to guarantee a certain social order, but merely to express this order in terms of juridical values, a social order which substantially has already been achieved in the concreteness of life and history. The law has only the character of a reflection of an equilibrium of forces achieved.

It is from this point of view that the author critically surveys the whole science of international law since the sixteenth century. He praises the older natural law doctrine. The best representatives—men active in the practice of states—identified *natura* more and more with the concrete social reality, identified *ratio* more and more with the convictions of the states constituting the international community. Only the positivism of the nineteenth, and the normativism of the twentieth century with their dogmas, respectively, of the imperativistic element and coercibility as essential for the concept of law, with their idea that law is a *prævis vis-à-vis* social reality, created the problem whether international law is law.

It is from this standpoint that the principal problems of general international law are studied. Greatest emphasis is always put on the statement that international law is an order, on a strict basis of parity, of a community which can only consist of independent and sovereign states, a law of voluntary coöperation of "entities *superiorem non recognoscentes*." That law is the expression of a concrete social reality. The idea of the "primitiveness" of the general international law, actually in force, is not a scientific analysis, but a political critique of this law.

It is from this standpoint, finally, that the proposals for a "progressive development" of international law are being criticized. The paradoxical trait of these proposals, according to the author, is that they all presuppose the non-continuation of the actual international community and of international law. They propose to solve the problem by new norms and new forms of organization, without telling us how to arrive at the new social reality, of which the "modern law of nations" would be the expression. For if the states were willing to accept these proposals, these proposals would not be necessary; the goal, a more intense and peaceful coöperation of states, could easily be achieved also within the present framework, if the states only were willing.

JOSEF L. KUNZ

Handbuch des internationalen Privatrechts unter besonderer Berücksichtigung der Schweizerischen Gesetzgebung und Rechtsprechung. (3rd ed.) By Adolf F. Schnitzer. Basel: Verlag für Recht und Gesellschaft, 1950. Vol. I, pp. xxii, 452; Vol. II, pp. xii, 897. Index.

Since the first edition of this handbook appeared in 1936 political conditions in Europe have had a profound influence even upon private international law. This has induced the author to endeavor to bring his material up to date. In Anglo-American jurisdictions, legislation relating to nationality is not ordinarily a subject dealt with in treatises on private international law. In the countries of the Continent of Europe, however, this is regularly a part of the material to be covered. The author has completely rewritten the part relating to nationality because of the many legislative changes made since World War II. He has also rewritten much of the material dealing with divorce and separation. Problems of conflicts of law in this field seem to have become more frequent in European countries just as they have in the United States. We also observe that new material has been added relating to clauses in conventions entered into by Switzerland with a number of countries relating to the execution of foreign judgments. Considerable attention is also given to the execution of foreign arbitral awards.

Although the work is intended as a treatise mainly on the law and legislation of Switzerland, it will be found valuable to students and practitioners elsewhere because of its comprehensive character and because the author has wisely omitted doctrinal discussions too far removed from actual recognition by the courts.

ARTHUR K. KUHN

Cases and Readings on Law and Society. By Sidney Post Simpson and Julius Stone, with the collaboration of M. Magdalena Schoch. (American Casebook Series.) St. Paul: West Publishing Co., 1948-49. 3 vols. pp. xlviii, xlv, xlii, 2389. Tables. Author Index. \$22.00.

These three volumes include "materials drawn from 4000 years of legal history from the Code of Hammurabi of 2090 B.C. to the 1948 proceedings of the United Nations Commission on Atomic Energy," and are designed to "make possible a course either in a law school or elsewhere which will give an understanding of the part law has played in the social, economic, and cultural history of mankind and its role in domestic and world affairs today" (p. vii). They attempt, their authors declare, "to do what has been so much talked about—correlate law with the social sciences—and in the only way this can be accomplished in the present state of our social knowledge, by a comparative and historical study which is neither dilettante nor antiquarian, but which is directed ultimately and squarely to the

central and pressing problems of the law in present day civilization" (p. x).

The organization of the book is, as promised, "historical" and its method "comparative." Volume I presents materials on "Law in a Kin-organized Society," "Law in an Emergent Political Society," "Law and the Rise of Commerce," and "Law and Expanding Industrialism." Volume II deals with "Law in Modern Democratic Society," and Volume III with "Law, Totalitarianism, and Democracy." With minor variations and differences in emphasis, the theme of development for each "stage" is from "social and ideological background" through "interests pressing and secured" to "the machinery of social control through law." For the content of the various sections the authors draw upon materials of the greatest variety: ancient and contemporary legislative prescriptions, judicial opinions, legal texts and articles, historical works, social science books, popular articles, public addresses, and so on. The great and the not so great, the famous and the unknown, the controversial and the dogmatic, the eloquent and the dull are paraded in a rapid succession of hundreds of items. The authors contribute a number of helpful introductions and explanatory notes. Some of the items in Volume III on the law of totalitarianism, for which the authors acknowledge the assistance of Dr. Schoch and Professor John Hazard, appear in English for the first time.

It must be conceded that the authors have brought together the richest store of materials yet available (among English-speaking peoples) for the teaching of jurisprudence or legal theory. Their work is an anthology which should fascinate anyone interested in law and the social process. It may be questioned, however, whether the authors have contributed greatly to their major objective of effecting a correlation of "law and the social sciences." Their work offers no clear conception of either "law" or "society" or of the interrelations of law and society or of contemporary scientific procedures for clarifying such concepts and exploring social processes. The authors do not make clear what it is they are comparing through space and time or by what criteria and techniques they make their comparisons. The adaptation of Dean Pound's theory of "interests" which the authors employ is an intellectual instrument too imprecise and truncated to bear the burdens they impose on it. For aspirations such as they state, a more comprehensive theory of human nature and of power and social processes in groups and communities of different sizes, from local to global, is required. One notes also in the chapters upon "the machinery of social control" a relative lack of emphasis upon the intelligence or planning function, so essential today to bring the findings of science to bear upon official and private behavior.

Among "the great problems of the democratic world today" the authors include "how to internationalize the world community sufficiently to

permit the survival of man" (p. 2177). Many specific items throughout the work are suggestive for the specialist in international law. Random notation picks up Malinowski's conception of law (p. 36), an editorial note on "Law and the Rise of Commerce" (p. 313), Collinet's remarks on *pacta sunt servanda* (p. 408), and the section on "Implications of Atomic Energy" (p. 2286). The whole of Volume III offers, of course, rich possibilities for comparing power processes in totalitarian and democratic societies. The section directly devoted to the "Internationalization of Positive Law" (Vol. III, Ch. VI, Sec. 5) is brief but to the point. Earlier (p. 1597) the editors had insisted: "Uranium 233 has made us one world." Here they quote from Simpson and Field:

There is no longer a distinction in kind between the subject-matter of international and municipal law. . . . What international commerce and finance and modern communication and transportation began, the release of atomic energy has completed. . . . Either we extend social control to the international sphere, and in so doing greatly modify the structure of our municipal law, or we give up control of our own destiny and wait in scared helplessness for *homo sapiens* to follow the evolutionary footsteps of the dinosaurs. (p. 2326.)

The principal contribution for international lawyers of the work under review is, in sum, in its aspiration and in the model it suggests. The scholars who do for international law and the world power process what the editors have attempted to do for municipal law will make a great contribution toward preventing man from following in the footsteps of the dinosaurs.

MYRES S. McDUGAL

Foundations for World Order. By E. L. Woodward and others. Denver: Social Science Foundation, 1949. pp. 174. \$3.00.

How Can We the People Achieve a Just Peace? Selected Speeches, Mount Holyoke College Institute on the United Nations. South Hadley: Mount Holyoke College, 1949. pp. viii, 254. \$2.00.

Those who adhere to the fundamental proposition that lasting peace can be achieved by academic analysis and popular discussion of international problems will welcome the above additions to the mounting tide of works devoted to the encouragement of an informed and articulate public opinion.

In 1946 the Social Science Foundation of the University of Denver invited outstanding authorities to address themselves to the *Foundations for World Order*. In his "Historical and Political Analysis," Ernest L. Woodward denies that Western civilization is foredoomed to collapse or that violence is the means of progress. He sees considerable hope in the fact that despite our first failure at world organization (League of Nations) we have made a second attempt through the United Nations. J. Robert Oppenheimer, in discussing the "Scientific Foundations," observes

that the "notion of order, the notion of law, implies reason—implies the ability of men by discussion and thought to come to agreement where there had been no agreement before."

Robert M. Hutchins believes that the "price of peace is justice" and that the way to promote the world community is through world government. However, E. H. Carr warns that there can be no moral foundations for world order "unless we find some commonly accepted ground on which to meet and discuss differences in order to reach some synthesis between them." Edward M. Earle asserts that the alternatives are either "the hegemony of a single power in Europe and Asia" or the "restoration of some sort of balance of power." William Rappard suggests that political ideas and psychological forces exercise greater motivation even than economic forces.

Publication of numerous speeches presented before the Mount Holyoke College Institute on the United Nations (1949) offers a challenge to the best in thinking. Included therein are addresses by prominent officials of the United Nations, of the United States and other countries, as well as by academicians and specialists. The main topics covered were "Human Rights and Individual Security," "The Problem of European Union," "Conflicts and Tensions in Asia," and "The Outlook for World Stability." The very diversity of viewpoints and variety of appeal, even among these men of good will, illustrates the difficulty of the problem.

Certain contributions merit special mention. Carlos Romulo warns that in "the inevitable contest for Asia's allegiance, that side will win which can best meet the requirements of Asian nationalism," a nationalism which demands the "liquidation of the remnants of the colonial system." J. Kenneth Galbraith suggests that the stubborn core of Europe's economic problem "may well be a fundamental and enduring imbalance" in its relations with the rest of the world and especially with the United States. Julian Towster believes that a "maximum understanding" between the West and the Soviet Union is impossible at present but hopes for a possible minimum understanding. A. H. Feller declares: "A group of scholars drawing up an ideal world constitution and having no responsibility for concrete tasks can promulgate what they want. A United Nations Council or Commission must deal with actual problems and must seek workable and acceptable solutions." One may wish to decry or applaud such statements, but one can hardly deny that they offer food for serious thought.

ALFRED J. HOTZ

NOTES

Ratifikatsiia Mezhdunarodnykh Dogovorov. By O. E. Polents. Moscow and Leningrad: Izdatel'stvo Akademii Nauk SSSR, 1950. pp. 64. Annex. Rubles 3. Aside from some purely political comments on the motives and

merits of the foreign policies of certain states, this little book contains a competent but very brief survey of international practice in the matter of ratification of treaties, as well as of pertinent provisions in the constitutions of the U.S.S.R., "the countries of people's democracy," and the principal capitalist states. The legal conclusions of the author are unexceptionable. He believes that there is generally no duty to ratify a treaty; that the answer to the question whether a particular treaty requires ratification must be sought in the common design of the parties and in their constitutional laws; that the competence of an organ to ratify a treaty on behalf of a state is determined by the constitutional law of that state; and that reservations to multipartite treaties, the admissibility of which depends on the will of the parties, are fresh offers which must be expressly or tacitly accepted by the other parties to be effective. A wide variety of Western sources and publications are cited in the footnotes, but it is surprising to find no reference to McNair's *The Law of Treaties*. Seven pages at the end are devoted to texts in Russian of the forms of ratification used by the governments of the U.S.S.R., the old Russian Empire, the United Kingdom, the United States, and France. Some of these texts are borrowed from a Soviet translation, published in 1947, of Satow's *Guide to Diplomatic Practice*.

OLIVER J. LISSITZYN

Das D-P Problem. Eine Studie über die ausländischen Flüchtlinge in Deutschland. Institut für Besatzungsfragen. Tübingen: Verlag J. C. B. Mohr, 1950. pp. 201. Appendices.

Missing Persons. The Law in the United States and Europe. By Franz Fraenkel. New York: Oceana Publications, 1950. pp. 80. \$1.00.

Arab Refugees. A Survey of Resettlement Possibilities. By S. G. Thicknesse. London and New York: Royal Institute of International Affairs, 1949. pp. x, 68. Maps. Appendices. \$1.00.

Americanizing Our Immigration Laws. By the American Jewish Committee. New York: American Jewish Committee, 1949. pp. 80. Maps.

Between World War I and World War II the problem of minorities was discussed almost entirely within the framework of the legalistic aspects of the Minorities Treaties. Today that aspect seems to be nearly entirely forgotten, the minorities problem having been transformed into the numerous ramifications of refugees and "displaced persons." Of these four small publications covering the contemporary picture of refugees in the various corners of the world the first named is the most scholarly and systematic, covering the various groups found in Germany in 1949 and the various means of handling them. Over eighty pages in the appendix contain the various legal documents pertaining to the situation. Fraenkel's booklet analyzes the law of the United States and of Europe as applied to missing persons. The subject is well and competently handled.

While legal points are frequently raised in these first two handbooks, the last two emphasize the sociological aspects. Thicknesse summarizes the findings of the Committee of Chatham House and of members of the Royal Central Asian Society aiming to recommend a program for the solution of the Arab refugee problem and other lesser problems left by the Palestine war, and generally to promote economic conditions conducive to peace.

The inescapable conclusion seems to be that "any resettlement will be immensely difficult, politically, financially, and socially; but that every delay increases the difficulty. If no settlement is attempted, most of the refugees will die." The appeal of the American Jewish Committee for liberalization of the immigration laws of the United States is the most readable of the whole lot. It combines scholarship, erudition, and common sense with appeals to the arguments provided by the proponents of the "cultural pluralism."

All in all, if anything definite emerges from these four works, it is the fact that the problem, whether it is known as that of minorities or refugees, has not only not been solved, but has been growing worse in recent years. These publications constitute a definite contribution to a systematic large work which, sooner or later, will have to survey the whole question in its world-wide international implications.

JOSEPH S. ROUCEK

Regional Conflicts Around Geneva. By Adda Bruemmer Bozeman. Stanford: Stanford University Press, 1949. pp. xv, 432. Index. To a limited number of people—such as European students, world planners, or those interested in the area—this study of the region around Geneva could be very useful; to many others, such as political scientists, international economists, and geopoliticians, it is a good example of a method now much needed in the study of international affairs. Mrs. Bozeman—who teaches at Sarah Lawrence College and who wrote the book with the aid of a grant from the Hoover Library at Stanford—has traced out and put compactly together the various factors which influenced the development of this regional system. She starts with the geographic and geopolitical factors in the area, traces the political struggles over it, shows the effects of economic factors and international independence, takes up the questions of international law involved (for example the theory of "servitude"), the action taken by the Permanent Court of International Justice, and considers the subsequent effort to readjust the complicated customs and others relations of the region. With no apparent stretching of the imagination, she suggests that the area is well located to be the headquarters area of a European Union or a world government; who knows?

It is a thorough and capable study which involved much research. Though the area is one of little current appeal, the book itself has value as a combination and coördination of various sciences in an attack upon one problem.

CLYDE EAGLETON

Lessons on Security and Disarmament from the History of the League of Nations. By James T. Shotwell and Marina Salvin. New York: King's Crown Press, 1949. pp. 149. \$2.25. This small volume of 149 pages, of which 40 are given over to documents, has as its stated purpose "to draw from that unique experiment (the League of Nations) suggestions and ideas which may be of use in the immediate or remote future." It is hoped in this way to throw some light on the problems now being dealt with by the United Nations. In Part I ("Methods and Instruments") brief chapters are devoted to a comparison of Covenant and Charter; the problems of armaments and security; the Treaty of Mutual Assistance; the Geneva

Protocol; the Locarno Treaties; proposals to organize peace, and the Treaty to Develop the Means for Preventing War. Part II contains brief or rather thumbnail factual surveys of the major political issues in the field of security which came before the Council for settlement. This is the most useful feature of the book, for no similar compilation has been made since Conwell-Evans' *The League Council in Action* (1929), which was much more ambitious, but is of course sadly out of date. In Part III, in separate chapters, the cases of Manchuria and Ethiopia before the League of Nations are given fuller treatment.

For beginners this little work will serve as a manual, and for mature students, as an *aide-mémoire*.

JOHN B. WHITTON

African Dependencies: A Challenge to Western Democracy. By Nwankwo Chukwuemeka. New York: William Frederick Press, 1950. pp. 208. Index. \$3.50. With the exception of the Introduction, which is a general review of European imperialism and colonialism, this book consists of a survey of the history, population, natural resources, and economy of the British Colony and Protectorate of Nigeria. Students of international law and political science will find little original information of interest to them, but Mr. Chukwuemeka has provided a valuable work of reference for those interested in economics and foreign trade. It is believed, moreover, that both the casual reader and scholars of modern Africa will be impressed with the author's clear and concise style of writing and the numerous facts and statistics which he includes on the geography, production, and foreign trade of Nigeria.

African Dependencies: A Challenge to Western Democracy leaves the impression that it is the product of an ardent and sincere patriot who is seeking to convey a message. Or perhaps it would be more accurate to state that the reviewer believes Mr. Chukwuemeka is attempting to enlist support for a cause. The central theme of the book appears to be that modern colonialism is almost as evil as its predecessor, 19th-century imperialism. The author's attempts to justify many of his conclusions are unconvincing and not in accord with the preponderant views of many present-day authorities. For example, the reviewer recalls that humanitarian principles and national responsibility for dependent or colonial areas were first acknowledged on an international basis in the Congo Basin treaties. These ideals were further developed in the Covenant of the League of Nations and reaffirmed in the Charter of the United Nations. Yet Mr. Chukwuemeka states that these ideals, admirable in theory though they may be, obscure the facts, and he contends, in effect, that the prime mover of modern colonialism still receives its impetus from the Industrial Revolution, particularly its search for surplus markets and raw materials. He apparently fails to recognize that since the Treaty of Versailles and especially since World War II, the fundamental concept of colonialism has been drastically revised. As a matter of fact, the majority of Mr. Chukwuemeka's opinions could not have been denied in 1914 and many of his theses were completely valid as late as 1939, but the reviewer expresses the belief that they are open to question today.

Although it is true that the struggle for raw materials and strategic defense posts had much to do with the causes of the two World Wars, the author's statement that, when reduced to the lowest denominator, the

major colonial Powers have reverted to their 1914 and 1939 positions remains to be proven. However, the reviewer endorses Mr. Chukwue-meka's implication that international agreements cloaked in terms of lasting peace and world harmony are doomed to failure as long as nations have unequal access to the world's raw materials and as long as indigenous colonial political movements are led by militant nationalists.

In summary *African Dependencies* is interesting and well worth reading. Although the political opinions expressed therein appear to be pro-Nigerian and anti-colonial in basic orientation, this approach, fortunately, does not detract from the book's much needed contribution to a better understanding of this part of Africa.

J. CUDD BROWN

Freedom of Information. A compilation. Vol. I. Comments of Governments. Lake Success: United Nations Department of Social Affairs, 1950. pp. xii, 271. This is mainly a collation of the replies from governments, both members and non-members of the United Nations, sent in response to a request from the Secretary General for information bearing on problems before the Conference on Freedom of Information and of the Press. The replies are arranged in accordance with the items on the agenda of that conference and are printed in their entirety. In addition, Chapter IX includes reports submitted at the request of the 1947 General Assembly on measures to combat the diffusion of false or distorted reports likely to injure friendly relations between states. A second volume, to appear later, will include relevant excerpts from constitutions, legislative enactments and regulations, judicial decisions, "codes of honor" and other materials received as annexes to the aforementioned replies.

Unfortunately, a number of governments, particularly some whose information policies are the most deplorable, failed to reply to the Secretary General's questionnaire. One looks in vain for replies from Soviet Russia or its satellites, with the exception of Czechoslovakia. Many other governments, too, failed to comply; only 31, in fact, have responded. Much of the missing information could have been supplied, it would seem, by independent research, and it is regrettable that no attempt was made thus to fill in the gaps.

Despite its incompleteness, the present collection is of undoubted interest. Some of the governments seem to have complied generously with the Secretary General's questionnaire. This is particularly true of the governments of the United States of America, the United Kingdom (for itself and colonies), France, Switzerland, Canada, and India. The value of the present volume may be judged by the large amount of data on such timely subjects as the following: the legal status of the press, radio and the newsreel; government activity in the field of freedom of information; state control of the media of news dissemination; laws dealing with the corruption of the press; laws and practices governing the status and work of news personnel and the international transmission of information; provisions for censorship; the right of reply and other measures to counteract false information or that dangerous to good international relations; and standards of professional conduct and competence.

To the student of international law there is in this compilation much that is valuable, especially with respect to the problem of controlling international propaganda dangerous to world peace. To the student of

world politics the book is equally interesting; studied in the light of the foreign policies of the states concerned, together with their traditional attitudes toward freedom of the press and other fundamental freedoms, this data no longer appears academic or dull, but on the contrary throws considerable light on many of the great international problems of the day.

JOHN B. WHITTON

The Community of Man. By Hugh Miller. New York: Macmillan Co., 1949. pp. 170. \$3.00. Hugh Miller brings the perspective of a philosopher to bear on one of the most pressing problems of our time. To the question "What must we do to be saved?" he gives this answer:

We must establish the association of kinship binding all societies into mankind. . . . The association is that which must be established now at this moment. Tomorrow may be too late. . . . The United States and Russia can establish the association which will now at this moment secure peace, persistence, progress, indefinite increase. . . . It is established with the advance of the United States and Soviet Russia to mutual respect. This is the sole condition.

We have learned that destiny lies wholly in human hands. Only man can provide or withhold the mechanisms effecting progress or destruction. . . . Communist and individualist economies must always coexist, side by side. This duality of political economy was and is contained within the very bowels of nature, which persists only in groups of individuals, in plurality of every sort.

Professor Miller's contribution certainly is not that of furnishing blueprints for the effecting of this *rapprochement*, but rather of finding philosophical arguments to sustain a particular approach to the problem. He is a monist who sees in the findings of evolutionary science an answer to the age-old philosophical question: Is nature a community or only a concourse of individuals? Relying on biology to furnish the answer, Miller finds that the individual organism is a real and natural unit, yet the unit of evolutionary change is not the individual organism but the "breeding population" with its genic structure. The actual evolution is the genealogy of groups, with types persisting in each group. Only the group persists. At the core of evolutionary progress is a central adaptable group which continues to produce variety of externally adapted types. It is that group which became mankind. It alone controlled and controls its destiny.

In this evolutionary process, reproductive adaptation internal to the group is primary; external adaptation is secondary. Types became fixated and were left by the wayside. The organismic analogy is carried over to society and the dangers of fixated cultures are properly enlarged upon.

The Community of Man is a closely reasoned and interesting philosophical treatise rather than a lasting contribution to the sociology of international relations. Charles Horton Cooley has explained the relations of the individual and the social much more acceptably than Miller, for instance. The book ranges over many philosophical problems contributing many challenging insights on the way. Professor Miller redefines philosophy by limiting it to rational knowledge of particular necessity as found in arithmetic and logic. He enlarges the field of empirical science to cover all other knowledge. Empirical science gives probable and approximate knowledge by finding through induction specific design in

similarity among particulars. Science thus enlarged is called upon to give answers to questions long pondered by philosophers.

Good is existence itself. The more existence the better. Therefore, whatever secures human increase and prevents human depopulation is good. God, Himself, is the child in the human family.

It is when Miller leaves conventional philosophy to grapple with the problems of social living that he displays his naïveté in social science. As a monist he tries to explain phenomena in the social realm in terms of biological analogy. He arbitrarily picks the nation-state as the natural social unit and equating it to an animal organism decrees that it must be true to its supposedly individualist or communist essence as the case may be. It is these discrete civilizational types rooted in the "bowels of nature" that must learn to tolerate each other, if quantitative increase of humanity is to continue. The complex interrelationships of human society are violated by this doctrinaire approach.

AUSTIN VAN DER SLICE

The Declaration of Independence and What It Means Today. By Edward Dumbauld. Norman: University of Oklahoma Press, 1950. pp. xiv, 194. \$3.00. To the millions of Americans who have not read the Declaration of Independence its meaning is simply a paean of liberty and a justification for America's existence. To the student of history the Declaration marks the birth of a nation—a birth which inspired Lincoln's great words, "conceived in liberty." To the student of law the Declaration marks not only the beginning of America's independence, but the justification for that independence and the legal backing for the various steps incident to our constitutional growth.

Dr. Dumbauld has taken each paragraph of the Declaration and put the meaning of that paragraph in terms of today. The meaning of each paragraph is explained in the light of history and in the recital of incidents which led to the acceptance of the paragraph. He shows the changes that were made after the original draft and gives credit to those responsible for the changes. Thus the Declaration of Independence takes on a broadened meaning and becomes in very deed the child of the people's and the States' representatives in Congress.

Although there should be some logic in law, government need not be, and, in fact, is not logical. Since the Declaration contains a bill of grievances it points out how a government should not act towards the people it governs. Thus, in a sense, a standard of governmental action was laid down. Therefore, when one reads the charge against the British King of "abolishing our most valuable laws," one admires again the brave stand of Chief Justice Marshall, after the "most perfect Union" was set up under the Constitution, in turning to the principle of judicial review to strike down Congress-enacted law.

The important thing for America was the process of growth under law, and this, for the newly established United States, definitely started with the Declaration. With it, too, came the restraining influence under an agreement which was so essential later in making the Constitution the supreme law of the land.

The Declaration thus was a legal plea. It shows how in law nations may begin and end. A complete acceptance of the contract theory of government is repeated and reiterated to such an extent that King George, in the

minds of the American people, ceased to be a king because he stopped acting like a king. In other words he broke his contract with the people.

The Declaration sounds as good today as it did in 1776. It had an appeal in 1776 as it has today, because, as Jefferson himself said of it, its "authority rests then on the harmonizing sentiments of the day whether expressed in conversation, in letters, in printed essays, or in elementary books or public right."

It was not the new things in it that gave it strength. It was the echoes of the hearts' desires of millions of men and women. And this is as it should be, for even the Ten Commandments and the Sermon on the Mount had some antecedents. Why should we not expect them in the Declaration of Independence? Had Jefferson blasted out something anew, the Declaration would never have been adopted.

Students of history have long ago known that the Founding Fathers were not children in the law and, despite their adherence to the compact theory, were not experimenters with government. While we now know that they builded greater than they thought, they were, nevertheless, men who knew what they were doing.

Dr. Dumbauld's scholarly book definitely proves that the Founding Fathers were very mature not only in politics and government, but in history, and that in the science of politics and in the art of government the Founding Fathers showed more maturity than did the leaders of the mother country. Once again the child proved greater than the parent. These deductions and many more the reader easily gets from the book. The book is a "must" for students of history, government, and constitutional development.

Thanks are to be extended to Dr. Dumbauld for giving us this survey with its good documentation and adequate bibliography and index.

ELBERT D. THOMAS

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INSTITUTE OF INTERNATIONAL LAW

RESOLUTIONS ADOPTED AT ITS BATH SESSION, SEPTEMBER, 1950 *

ASYLUM IN PUBLIC INTERNATIONAL LAW (EXCLUDING NEUTRAL ASYLUM)

(5th Commission)

The Institute of International Law,

Recalling its Resolutions of New York (1929) on the international rights of man, of Brussels (1936) on the juridical status of stateless persons and refugees, and of Lausanne (1947) on the fundamental rights of man, the basis of a restoration of international law,

Recalling its Resolutions of Stockholm (1928) on the legal status of ships and their crews in foreign ports, Article 21 of which refers to a case of asylum,

Recalling, moreover, Article 2 of its Resolutions of Neuchâtel (1900) on the rights and duties of foreign powers, in case of insurrectionary movements against established and recognized governments,

Having regard to the Universal Declaration of the Rights of Man adopted by the General Assembly of the United Nations (1948),

Noting that international recognition of the rights of the human person requires new and wider developments of asylum,

Considering in particular that the mass exodus of people, compelled for political reasons to leave their countries, lays upon States the duty to unite their efforts with a view to providing for the demands of such situations,

Considering the advantage of formulating now certain rules suitable for future observance by States in the matter of asylum,

Adopts the following Resolutions:

CHAPTER I

Definition

ARTICLE 1

In the present Resolutions, the term "asylum" means the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it.

*Translation by Sir Arnold D. McNair.

CHAPTER II

Asylum granted by States on their own territory

ARTICLE 2

1. Any State which, in fulfilment of its humanitarian duties, grants asylum on its territory, does not thereby incur any international responsibility.

2. The State incurs international responsibility for the actions of the refugee only in the same conditions in which it would be responsible for the actions of any other person living in its territory. This rule is applicable both when, should the case arise, the State is able to expel the refugee and when expulsion is rendered impossible by the refusal of other States to receive him.

3. When political events cause an exodus of fugitives from any State, other States shall consult one another on the most effective means of rendering help and assistance to the fugitives, if necessary having recourse to an international organization, and on the most equitable manner of distributing them upon their respective territories and, in general, on any measures to be taken with a view to fulfilling their humanitarian duties.

CHAPTER III

Asylum granted by States outside their territory

ARTICLE 3

1. Asylum may be granted on the premises of diplomatic missions, consulates, warships, government ships used for public services, military aircraft and premises within the jurisdiction of another organ of a foreign State authorised to exercise authority over that territory.

2. Asylum may be granted to any person whose life, liberty or person is threatened by violence emanating from the local authorities or against which they are obviously powerless to protect him, or even which they tolerate or provoke. These provisions shall apply in the same conditions when such threat is the result of civil strife.

3. In cases where the powers of government in the country are manifestly disorganised or under the control of any faction to such an extent that private individuals no longer have sufficient guarantees for their safety, diplomatic agents and commanders of warships or military aircraft may grant or continue to afford asylum even against prosecutions instituted by bodies exercising authority on the spot (*autorités locales*).

4. Whatever the organ may be which has granted asylum, it must inform the competent local authority, unless such communication would jeopardise the security of the refugee. It may keep the latter as long as the situation which justified asylum continues.

ARTICLE 4

1. In case of armed civil strife, the diplomatic agent or commander of a warship or of a military aircraft who has granted asylum, may keep the persons whose safety is threatened for political reasons until he has the opportunity of evacuating them outside the territory. Such evacuation shall take place according to the conditions and circumstances agreed upon with the competent authority, whenever the safety of the refugee allows it.

2. The diplomatic agent or the commander shall make sure of the identity of all the refugees.

3. The diplomatic agent or the commander must make sure that the refugee shall not participate in political activities or be able to communicate with the outside world to the prejudice of the local government and, generally, that the refugee shall not employ any means of supporting one of the parties to the conflict.

4. In cases where the local government delays in prescribing the conditions and circumstances in which the refugees may be evacuated, or if circumstances beyond the power of that government or of the diplomatic agent temporarily prevent their evacuation, it shall agree that the diplomatic agent may add to the premises of his mission to the extent that may be necessary in order to harbour the refugees.

5. When, as a result of civil strife, large numbers of persons seek asylum on the premises of diplomatic missions, the heads of those missions shall consult with one another with a view to co-ordinating their action in the matter of asylum.

ARTICLE 5

In cases where the local government contests the right of the organ of another State to grant asylum, or admits it only under certain conditions, it shall present its claim to the State to which the organ in question belongs and may not put an end to the asylum by coercive measures.

ARTICLE 6

Questions relating to asylum shall be discussed by the diplomatic agent with the Minister for Foreign Affairs. The commander of a warship shall discuss these questions with the competent higher naval authorities.

ARTICLE 7

Nothing in the present Resolutions shall affect local usages sanctioning more favourable conditions of asylum.

ARTICLE 8

The right of a State to protect its nationals is in no way affected by the provisions of the present Resolutions.

CHAPTER IV

Final Provisions

ARTICLE 9

The foregoing provisions in no way prejudice asylum on the premises of international organisations.

ARTICLE 10

Any difference arising from the interpretation or the application of the foregoing rules which is not settled either through diplomatic channels or arbitration or some other procedure, shall fall within the compulsory jurisdiction of the International Court of Justice in accordance with its Statute.

[The French text is authentic.]

II. THE EXTRATERRITORIAL SCOPE OF FOREIGN PENAL JUDGMENTS

(7th Commission)

The Institute of International Law,

Continuing the revision of its Munich Resolutions (1883), concerning the conflict of criminal laws relating to jurisdiction, a revision which was partially accomplished at its Cambridge Session in 1931, considers it useful to add to the provisions adopted at Cambridge certain new provisions concerning the extra-territorial scope of penal judgments;

Whereas the principle *non bis in idem* is essential to the interests of justice, and whereas, if any exceptions are to be made, such exceptions should be restricted as much as possible;

Recommends the following provisions as a basis for the conclusion of treaties, whether bilateral or multilateral, or as a model for provisions of the national law.

ARTICLE 1

When an offence not falling within the categories mentioned in Article 3 hereunder has been the object of a final judgment in the country in which it was committed,¹ and when, in the case of a condemnation, the person condemned has served his sentence or has been exempted from doing so, the said offence cannot be the object of a prosecution in another country.

However, this rule does not apply if the judgment involves unjust discrimination against either the accused or the victim of the offence.

ARTICLE 2

When an offence has been the object of a final judgment in a country other than that in which it was committed, this offence may form the object

¹ In order to determine the place of the offence, the Institute refers to Article 2 of the Cambridge Resolutions (1931).

of a new prosecution in the latter country, but only upon the initiative of a competent public authority.¹

ARTICLE 3

A new prosecution may also take place under the same conditions, when an offence which has been committed, and has been the object of a final judgment, outside the territory of the State, constitutes either

- a) an attack on the security of that State; or
- b) falsification of its money, stamps, seals or official marks.

ARTICLE 4

In the case of a prosecution instituted in pursuance of the preceding articles, it is for each State to determine the manner in which account shall be taken, in carrying out the sentence, of the punishment or any part thereof which has been served in another country, or of any detention therein pending trial.

The court which deals with the case last may take into consideration the reasons for any exemption from punishment (*dispense de peine*) which may have been granted abroad.

ARTICLE 5

When a prosecution has been instituted before the courts of one State at the express request of another State, and when a final judgment has been given, no new prosecution for the same act against the same person may be instituted in the courts of the latter State.

However, if the person condemned has evaded (*s'est soustrait*) the serving of his sentence either wholly or in part, a new prosecution may be instituted upon the initiative of a competent public authority (*ministère public*), and the provisions of Article 4 shall apply.

ARTICLE 6

The foregoing provisions do not prevent a country other than that in which a final judgment has been pronounced, from deciding upon the prohibitions (*interdictions*), suspensions of rights or disqualifications resulting from such judgment.

ARTICLE 7

A final judgment pronounced in a foreign country may be taken into consideration from the point of view of granting or revoking respite (*sursis*) of the execution of a sentence, of the application of measures of safety, of habitual offences, or of judicial or legal rehabilitation (*réhabilitation judiciaire ou légale*), when the law of the court dealing with the case also regards the offence which has given rise to that sentence, as an offence.

¹ This restriction concerns those legal systems which grant to the injured party the right of instituting a public prosecution.

ARTICLE 8

A final judgment pronounced in a foreign country by courts of criminal jurisdiction may be enforced against property for the purposes of restitution, compensation for damage and other private law effects, in accordance with the conditions and procedure established by law.

ARTICLE 9

The effects provided for in Articles 6, 7 and 8 attach to a final judgment pronounced in a foreign country by a court of criminal jurisdiction, even when fulfilling the conditions above mentioned, only

- a) if it concerns offences against the ordinary law (*droit commun*);
- b) if the defence of the person condemned has been properly assured;
- c) and if it involves no provision contrary to public policy.

* * *

Furthermore, the Institute considers that it would be easier to give effect to these new provisions if the High Contracting Parties were to establish a comparative table of the penalties provided for by their respective systems.

[The French text is authentic. As the translation of these Resolutions gives rise to some difficulty, some of the French terms have been inserted.]

III. CONDITIONS FOR THE GRANTING OF INTERNATIONAL STATUS
TO ASSOCIATIONS ESTABLISHED BY PRIVATE INITIATIVE

(16th Commission)

The Institute of International Law,

Recognising that a task of great international importance is being performed by associations and foundations established by private initiative;

Being aware that their legal status is not always clearly defined and that their international work is being hampered by legal and administrative difficulties, whether they are constituted in accordance with the national law or simply depend on contract;

Desiring to facilitate by every possible means their access to the most favourable legal status and to grant them administrative facilities for their international work;

Recommends that an international convention be drafted on the basis of the provisions of the present Resolution;

Expresses the wish that, even before the conclusion of such a convention, every State willing to facilitate the work of the associations or foundations referred to in the draft Convention should spontaneously grant to associations and foundations selected by it for this purpose the benefit of the sys-

tem established in the draft Convention, under the conditions and with the reservations deemed necessary.

DRAFT CONVENTION

ARTICLE 1

Each Contracting Party agrees to grant to international associations and to foundations possessing an international interest recognition of the rights defined in this Convention, after examining and verifying the requirements of substance and form laid down in the following articles.

ARTICLE 2

The international associations referred to in Article 1 are groups of persons or of societies, freely created by private initiative, which are engaged in some international activity of general interest, without seeking pecuniary profit and without any object of a purely national character.

ARTICLE 3

The recognition of rights in pursuance of Article 1 may be granted irrespective of the legal régime of the association in question.

An association applying for recognition of international status must have a statute indicating clearly:

1. its name, emblem and insignia;
2. its purposes;
3. its temporary or permanent seat;
4. its composition and conditions of membership;
5. the rights, duties and responsibilities of members;
6. its organisation and the method of election or appointment, and the powers and responsibilities, of its representatives;
7. the administration and use of its property;
8. its method of work and, in general, the various forms of its activity;
9. the procedure for the revision of its statute;
10. the conditions, the form and the effects of its dissolution.

The procedure of the recognition provided for in Article 1 shall be determined by each of the Contracting Parties. They shall consult together in order to ensure as much as possible uniformity of procedure and simplification of formalities.

ARTICLE 4

The rights referred to in this Convention may be denied to any association whose activity is contrary to public policy, morality or to the provisions of its statute. The same applies if its representatives appear to constitute a danger to the public policy of the Contracting Party concerned.

ARTICLE 5

An association which has been recognised by one of the Contracting Parties may be deprived by that Party of the benefit of international status only in the cases specified in Article 4.

The association deprived of this benefit shall be entitled to realize its property and to transfer its funds to another country in accordance with the provisions of the national law.

ARTICLE 6

The international associations referred to in Article 1 shall receive on the territory of each Contracting Party the most favourable treatment granted by ordinary law to national non-profit-making associations, especially regarding their activity, the collection of subscriptions, the acquisition and ownership of real and personal property to the extent required for the operations of the associations, and the acceptance of gifts and legacies, and regarding taxation.

ARTICLE 7

The list of international associations referred to in Article 1 shall be notified by each Contracting Party to the competent national authorities, so that such associations may have the benefit of the best possible status permitted by the law in force, with regard to the movement of individuals, the employment of foreign labour, the transmission of documents by post or the transfer of moneys.

ARTICLE 8

The foregoing provisions, other than those which can concern only associations, also apply to foundations of international interest constituted under the law of one of the Contracting Parties.

ARTICLE 9

The names of the associations and foundations to which one of the Contracting Parties has granted the benefit of this Convention, as well as any withdrawal of such benefit under Article 5, shall be notified to the other Contracting Parties.

ARTICLE 10

Any Contracting Party granting to associations and foundations referred to in this Convention a status more favourable than that provided for in Articles 6 and 7 shall notify the other Contracting Parties accordingly.

ARTICLE 11

The associations and foundations referred to in this Convention which do not apply for the international status provided for herein, or which are

not recognised by one of the Contracting Parties in pursuance of Articles 1 or 8, shall continue to enjoy the status existing before the entry into force of this Convention.

ARTICLE 12

Any dispute arising from the interpretation or the application of this Convention, which has not been settled either by diplomatic negotiation, by arbitration or by other procedure, shall be subject to the compulsory jurisdiction of the International Court of Justice in conformity with its Statute.

[The French text is authentic.]

CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

*Signed at Rome, November 4, 1950 **

The Governments signatory hereto, being Members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December, 1948;¹

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration;

Have agreed as follows:—

ARTICLE 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Section I

ARTICLE 2

(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

* Great Britain, Miscellaneous No. 1 (1951), Cmd. 8130.

¹ "United Nations No. 2 (1949)," Cmd. 7362. [See also this JOURNAL, Supp., Vol. 43 (1949), p. 127.]

(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary—

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 4

(1) No one shall be held in slavery or servitude.
(2) No one shall be required to perform forced or compulsory labour.
(3) For the purpose of this Article the term "forced or compulsory labour" shall not include—

- (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
- (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
- (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- (d) any work or service which forms part of normal civic obligations.

ARTICLE 5

(1) Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:—

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ARTICLE 6

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:—

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;

- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and

ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11

(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

ARTICLE 12

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

ARTICLE 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

ARTICLE 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

ARTICLE 15

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its

obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

ARTICLE 16

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

ARTICLE 17

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

ARTICLE 18

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Section II

ARTICLE 19

To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up—

- (1) A European Commission of Human Rights, hereinafter referred to as "the Commission";
- (2) A European Court of Human Rights, hereinafter referred to as "the Court."

Section III

ARTICLE 20

The Commission shall consist of a number of members equal to that of the High Contracting Parties. No two members of the Commission may be nationals of the same State.

ARTICLE 21

(1) The members of the Commission shall be elected by the Committee of Ministers by an absolute majority of votes, from a list of names drawn up by the Bureau of the Consultative Assembly; each group of the Representatives of the High Contracting Parties in the Consultative Assembly shall put forward three candidates, of whom two at least shall be its nationals.

(2) As far as applicable, the same procedure shall be followed to complete the Commission in the event of other States subsequently becoming Parties to this Convention, and in filling casual vacancies.

ARTICLE 22

(1) The members of the Commission shall be elected for a period of six years. They may be re-elected. However, of the members elected at the first election, the terms of seven members shall expire at the end of three years.

(2) The members whose terms are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary-General of the Council of Europe immediately after the first election has been completed.

(3) A member of the Commission elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

(4) The members of the Commission shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

ARTICLE 23

The members of the Commission shall sit on the Commission in their individual capacity.

ARTICLE 24

Any High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party.

ARTICLE 25

(1) The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting

Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

(2) Such declarations may be made for a specific period.

(3) The declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties and publish them.

(4) The Commission shall only exercise the powers provided for in this Article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs.

ARTICLE 26

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

ARTICLE 27

(1) The Commission shall not deal with any petition submitted under Article 25 which—

(a) is anonymous, or

(b) is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information.

(2) The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of petition.

(3) The Commission shall reject any petition referred to it which it considers inadmissible under Article 26.

ARTICLE 28

In the event of the Commission accepting a petition referred to it—

(a) it shall, with a view to ascertaining the facts, undertake, together with the representatives of the parties, an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission;

(b) it shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention.

ARTICLE 29

(1) The Commission shall perform the functions set out in Article 28 by means of a Sub-Commission consisting of seven members of the Commission.

(2) Each of the parties concerned may appoint as members of this Sub-Commission a person of its choice.

(3) The remaining members shall be chosen by lot in accordance with arrangements prescribed in the Rules of Procedure of the Commission.

ARTICLE 30

If the Sub-Commission succeeds in effecting a friendly settlement in accordance with Article 28, it shall draw up a Report which shall be sent to the States concerned, to the Committee of Ministers and to the Secretary-General of the Council of Europe for publication. This Report shall be confined to a brief statement of the facts and of the solution reached.

ARTICLE 31

(1) If a solution is not reached, the Commission shall draw up a Report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention. The opinions of all the members of the Commission on this point may be stated in the Report.

(2) The Report shall be transmitted to the Committee of Ministers. It shall also be transmitted to the States concerned, who shall not be at liberty to publish it.

(3) In transmitting the Report to the Committee of Ministers the Commission may make such proposals as it thinks fit.

ARTICLE 32

(1) If the question is not referred to the Court in accordance with Article 48 of this Convention within a period of three months from the date of the transmission of the Report to the Committee of Ministers, the Committee of Ministers shall decide by a majority of two-thirds of the members entitled to sit on the Committee whether there has been a violation of the Convention.

(2) In the affirmative case the Committee of Ministers shall prescribe a period during which the High Contracting Party concerned must take the measures required by the decision of the Committee of Ministers.

(3) If the High Contracting Party concerned has not taken satisfactory measures within the prescribed period the Committee of Ministers shall decide by the majority provided for in paragraph (1) above what effect shall be given to its original decision and shall publish the Report.

(4) The High Contracting Parties undertake to regard as binding on them any decision which the Committee of Ministers may take in application of the preceding paragraphs.

ARTICLE 33

The Commission shall meet *in camera*.

ARTICLE 34

The Commission shall take its decisions by a majority of the Members present and voting; the Sub-Commission shall take its decisions by a majority of its members.

ARTICLE 35

The Commission shall meet as the circumstances require. The meetings shall be convened by the Secretary-General of the Council of Europe.

ARTICLE 36

The Commission shall draw up its own rules of procedure.

ARTICLE 37

The secretariat of the Commission shall be provided by the Secretary-General of the Council of Europe.

Section IV

ARTICLE 38

The European Court of Human Rights shall consist of a number of judges equal to that of the Members of the Council of Europe. No two judges may be nationals of the same State.

ARTICLE 39

(1) The members of the Court shall be elected by the Consultative Assembly by a majority of the votes cast from a list of persons nominated by the Members of the Council of Europe; each Member shall nominate three candidates, of whom two at least shall be its nationals.

(2) As far as applicable, the same procedure shall be followed to complete the Court in the event of the admission of new Members of the Council of Europe, and in filling casual vacancies.

(3) The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be juriconsults of recognised competence.

ARTICLE 40

(1) The members of the Court shall be elected for a period of nine years. They may be re-elected. However, of the members elected at the first election the terms of four members shall expire at the end of three years and the terms of four more members shall expire at the end of six years.

(2) The members whose terms are to expire at the end of the initial periods of three and six years shall be chosen by lot by the Secretary-General immediately after the first election has been completed.

(3) A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

(4) The members of the Court shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

ARTICLE 41

The Court shall elect its President and Vice-President for a period of three years. They may be re-elected.

ARTICLE 42

The members of the Court shall receive for each day of duty a compensation to be determined by the Committee of Ministers.

ARTICLE 43

For the consideration of each case brought before it the Court shall consist of a Chamber composed of seven judges. There shall sit as an *ex officio* member of the Chamber the judge who is a national of any State party concerned, or, if there is none, a person of its choice who shall sit in the capacity of judge; the names of the other judges shall be chosen by lot by the President before the opening of the case.

ARTICLE 44

Only the High Contracting Parties and the Commission shall have the right to bring a case before the Court.

ARTICLE 45

The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48.

ARTICLE 46

(1) Any of the High Contracting Parties may at any time declare that it recognises as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.

(2) The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain other High Contracting Parties or for a specified period.

(3) These declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties.

ARTICLE 47

The Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months provided for in Article 32.

ARTICLE 48

The following may bring a case before the Court, provided that the High Contracting Party concerned, if there is only one, or the High Contracting Parties concerned, if there is more than one, are subject to the compulsory jurisdiction of the Court or, failing that, with the consent of the High Contracting Party concerned, if there is only one, or of the High Contracting Parties concerned if there is more than one—

- (a) the Commission;
- (b) a High Contracting Party whose national is alleged to be a victim;
- (c) a High Contracting Party which referred the case to the Commission;
- (d) a High Contracting Party against which the complaint has been lodged.

ARTICLE 49

In the event of dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

ARTICLE 50

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

ARTICLE 51

- (1) Reasons shall be given for the judgment of the Court.
- (2) If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

ARTICLE 52

The judgment of the Court shall be final.

ARTICLE 53

The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.

ARTICLE 54

The judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.

ARTICLE 55

The Court shall draw up its own rules and shall determine its own procedure.

ARTICLE 56

- (1) The first election of the members of the Court shall take place after the declarations by the High Contracting Parties mentioned in Article 46 have reached a total of eight.
- (2) No case can be brought before the Court before this election.

Section V

ARTICLE 57

On receipt of a request from the Secretary-General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention.

ARTICLE 58

The expenses of the Commission and the Court shall be borne by the Council of Europe.

ARTICLE 59

The members of the Commission and of the Court shall be entitled, during the discharge of their functions, to the privileges and immunities provided

for in Article 40 of the Statute of the Council of Europe² and in the agreements made thereunder.

ARTICLE 60

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

ARTICLE 61

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

ARTICLE 62

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

ARTICLE 63

(1) Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary-General of the Council of Europe that the present Convention shall extend to all or any of the territories for whose international relations it is responsible.

(2) The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary-General of the Council of Europe.

(3) The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

(4) Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Commission to receive petitions from individuals, non-governmental organisations or groups of individuals in accordance with Article 25 of the present Convention.

ARTICLE 64

(1) Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular

² "Treaty Series No. 51 (1949)," Cmd. 7773. [See also this JOURNAL, Supp., Vol. 43 (1949), p. 162.]

provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

(2) Any reservation made under this Article shall contain a brief statement of the law concerned.

ARTICLE 65

(1) A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a Party to it and after six months' notice contained in a notification addressed to the Secretary-General of the Council of Europe, who shall inform the other High Contracting Parties.

(2) Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

(3) Any High Contracting Party which shall cease to be a Member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

(4) The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 63.

ARTICLE 66

(1) This Convention shall be open to the signature of the Members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary-General of the Council of Europe.

(2) The present Convention shall come into force after the deposit of ten instruments of ratification.

(3) As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

(4) The Secretary-General of the Council of Europe shall notify all the Members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November, 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatories.

- | | |
|---|---|
| For the Government of the Kingdom
of Belgium: | For the Government of the Grand
Duchy of Luxembourg: |
| PAUL VAN ZEELAND. | JOS. BECH. |
| For the Government of the Kingdom
of Denmark: | For the Government of the Kingdom
of the Netherlands: |
| O. C. MOHR. | STIKKER. |
| For the Government of the French
Republic: | For the Government of the Kingdom
of Norway: |
| SCHUMAN. | HALVARD M. LANGE. |
| For the Government of the German
Federal Republic: | For the Government of the Saar: |
| WALTER HALLSTEIN. | E. HECTOR. |
| For the Government of the Icelandic
Republic: | For the Government of the Turkish
Republic: |
| PETUR BENEDIKTSSON. | F. KÖPRÜLÜ. |
| For the Government of the Irish Re-
public: | For the Government of the United
Kingdom of Great Britain and
Northern Ireland: |
| SEAN MACBRIDE. | ERNEST DAVIES. |
| For the Government of the Italian
Republic: | |
| SFORZA. | |

INTERNATIONAL CONVENTION FOR THE NORTHWEST ATLANTIC FISHERIES¹

Signed at Washington, February 8, 1949; in force July 3, 1950

The Governments whose duly authorized representatives have subscribed hereto, sharing a substantial interest in the conservation of the fishery resources of the Northwest Atlantic Ocean, have resolved to conclude a convention for the investigation, protection and conservation of the fisheries of the Northwest Atlantic Ocean, in order to make possible the maintenance of a maximum sustained catch from those fisheries and to that end have, through their duly authorized representatives, agreed as follows:

ARTICLE I

1. The area to which this Convention applies, hereinafter referred to as "the Convention area," shall be all waters, except territorial waters, bounded by a line beginning at a point on the coast of Rhode Island in 71°40' west longitude; thence due south to 39°00' north latitude; thence due east to 42°00' west longitude; thence due north to 59°00' north latitude; thence due west to 44°00' west longitude; thence due north to the coast of Greenland; thence along the west coast of Greenland to 78°10' north latitude; thence southward to a point in 75°00' north latitude and 73°30' west longitude; thence along a rhumb line to a point in 69°00' north latitude and 59°00' west longitude; thence due south to 61°00' north latitude; thence due west to 64°30' west longitude; thence due south to the coast of Labrador; thence in a southerly direction along the coast of Labrador to the southern terminus of its boundary with Quebec; thence in a westerly direction along the coast of Quebec, and in an easterly and southerly direction along the coasts of New Brunswick, Nova Scotia, and Cape Breton Island to Cabot Strait; thence along the coasts of Cape Breton Island, Nova Scotia, New Brunswick, Maine, New Hampshire, Massachusetts, and Rhode Island to the point of beginning.

2. Nothing in this Convention shall be deemed to affect adversely (prejudice) the claims of any Contracting Government in regard to the limits of territorial waters or to the jurisdiction of a coastal state over fisheries.

¹ Department of State, Treaties and Other International Acts Series, No. 2089 (Pub. 3941). Ratifications have been deposited by the following signatories: Canada (including Newfoundland), Denmark, Iceland, United Kingdom, United States. The instrument of ratification by Canada was deposited with the following observation: "That ratification by Canada of the Convention extends to Newfoundland, and that any claims Canada may have in regard to the limits of territorial waters or to the jurisdiction over fisheries, particularly as a result of the entry of Newfoundland into Confederation, will not be prejudiced."

3. The Convention area shall be divided into five sub-areas, the boundaries of which shall be those defined in the Annex to this Convention, subject to such alterations as may be made in accordance with the provisions of paragraph 2 of Article VI.

ARTICLE II

1. The Contracting Governments shall establish and maintain a Commission for the purposes of this Convention. The Commission shall be known as the International Commission for the Northwest Atlantic Fisheries, hereinafter referred to as "the Commission."

2. Each of the Contracting Governments may appoint not more than three Commissioners and one or more experts or advisers to assist its Commissioner or Commissioners.

3. The Commission shall elect from its members a Chairman and a Vice Chairman, each of whom shall serve for a term of two years and shall be eligible for re-election but not to a succeeding term. The Chairman and Vice Chairman must be Commissioners from different Contracting Governments.

4. The seat of the Commission shall be in North America at a place to be chosen by the Commission.

5. The Commission shall hold a regular annual meeting at its seat or at such place in North America as may be agreed upon by the Commission.

6. Any other meeting of the Commission may be called by the Chairman at such time and place as he may determine, upon the request of the Commissioner of a Contracting Government and subject to the concurrence of the Commissioners of two other Contracting Governments, including the Commissioner of a Government in North America.

7. Each Contracting Government shall have one vote which may be cast by any Commissioner from that Government. Decisions of the Commission shall be taken by a two-thirds majority of the votes of all the Contracting Governments.

8. The Commission shall adopt, and amend as occasion may require, financial regulations and rules and by-laws for the conduct of its meetings and for the exercise of its functions and duties.

ARTICLE III

1. The Commission shall appoint an Executive Secretary according to such procedure and on such terms as it may determine.

2. The staff of the Commission shall be appointed by the Executive Secretary in accordance with such rules and procedures as may be determined and authorized by the Commission.

3. The Executive Secretary shall, subject to the general supervision of the Commission, have full power and authority over the staff and shall perform such other functions as the Commission shall prescribe.

ARTICLE IV

1. The Contracting Governments shall establish and maintain a Panel for each of the sub-areas provided for by Article I, in order to carry out the objectives of this Convention. Each Contracting Government participating in any Panel shall be represented on such Panel by its Commissioner or Commissioners, who may be assisted by experts or advisers. Each Panel shall elect from its members a Chairman who shall serve for a period of two years and shall be eligible for re-election but not to a succeeding term.

2. After this Convention has been in force for two years, but not before that time, Panel representation shall be reviewed annually by the Commission, which shall have the power, subject to consultation with the Panel concerned, to determine representation on each Panel on the basis of current substantial exploitation in the sub-area concerned of fishes of the cod group (Gadiformes), of flat-fishes (Pleuronectiformes), and of rosefish (genus Sebastes), except that each Contracting Government with coastline adjacent to a sub-area shall have the right of representation on the Panel for the sub-area.

3. Each Panel may adopt, and amend as occasion may require, rules of procedure and by-laws for the conduct of its meetings and for the exercise of its functions and duties.

4. Each Government participating in a Panel shall have one vote, which shall be cast by a Commissioner representing that Government. Decisions of the Panel shall be taken by a two-thirds majority of the votes of all the Governments participating in that Panel.

5. Commissioners of Contracting Governments not participating in a particular Panel shall have the right to attend the meetings of such Panel as observers, and may be accompanied by experts and advisers.

6. The Panel shall, in the exercise of their functions and duties, use the services of the Executive Secretary and the staff of the Commission.

ARTICLE V

1. Each Contracting Government may set up an Advisory Committee composed of persons, including fishermen, vessel owners and others, well informed concerning the problems of the fisheries of the Northwest Atlantic Ocean. With the assent of the Contracting Government concerned, a representative or representatives of an Advisory Committee may attend as observers all non-executive meetings of the Commission or of any Panel in which their Government participates.

2. The Commissioners of each Contracting Government may hold public hearings within the territories they represent.

ARTICLE VI

1. The Commission shall be responsible in the field of scientific investigation for obtaining and collating the information necessary for maintaining those stocks of fish which support international fisheries in the Convention area and the Commission may, through or in collaboration with agencies of the Contracting Governments or other public or private agencies and organizations or, when necessary, independently:

(a) make such investigations as it finds necessary into the abundance, life history and ecology of any species of aquatic life in any part of the Northwest Atlantic Ocean;

(b) collect and analyze statistical information relating to the current conditions and trends of the fishery resources of the Northwest Atlantic Ocean;

(c) study and appraise information concerning the methods for maintaining and increasing stocks of fish in the Northwest Atlantic Ocean;

(d) hold or arrange such hearings as may be useful or essential in connection with the development of complete factual information necessary to carry out the provisions of this Convention;

(e) conduct fishing operations in the Convention area at any time for purposes of scientific investigation;

(f) publish and otherwise disseminate reports of its findings and statistical, scientific and other information relating to the fisheries of the Northwest Atlantic Ocean as well as such other reports as fall within the scope of this Convention.

2. Upon the unanimous recommendation of each Panel affected, the Commission may alter the boundaries of the sub-areas set out in the Annex. Any such alteration shall forthwith be reported to the Depositary Government which shall inform the Contracting Governments, and the sub-areas defined in the Annex shall be altered accordingly.

3. The Contracting Governments shall furnish to the Commission, at such time and in such form as may be required by the Commission, the statistical information referred to in paragraph 1 (b) of this Article.

ARTICLE VII

1. Each Panel established under Article IV shall be responsible for keeping under review the fisheries of its sub-area and the scientific and other information relating thereto.

2. Each Panel, upon the basis of scientific investigations, may make recommendations to the Commission for joint action by the Contracting Governments on the matters specified in paragraph 1 of Article VIII.

3. Each Panel may recommend to the Commission studies and investigations within the scope of this Convention which are deemed necessary in the development of factual information relating to its particular sub-area.

4. Any Panel may make recommendations to the Commission for the alteration of the boundaries of the sub-areas defined in the Annex.

5. Each Panel shall investigate and report to the Commission upon any matter referred to it by the Commission.

6. A Panel shall not incur any expenditure except in accordance with directions given by the Commission.

ARTICLE VIII

1. The Commission may, on the recommendations of one or more Panels, and on the basis of scientific investigations, transmit to the Depositary Government proposals, for joint action by the Contracting Governments, designed to keep the stocks of those species of fish which support international fisheries in the Convention area at a level permitting the maximum sustained catch by the application, with respect to such species of fish, of one or more of the following measures:

- (a) establishing open and closed seasons;
- (b) closing to fishing such portions of a sub-area as the Panel concerned finds to be a spawning area or to be populated by small or immature fish;
- (c) establishing size limits for any species;
- (d) prescribing the fishing gear and appliances the use of which is prohibited;
- (e) prescribing an over-all catch limit for any species of fish.

2. Each recommendation shall be studied by the Commission and thereafter the Commission shall either

- (a) transmit the recommendation as a proposal to the Depositary Government with such modifications or suggestions as the Commission may consider desirable, or
- (b) refer the recommendation back to the Panel with comments for its reconsideration.

3. The Panel may, after reconsidering the recommendation returned to it by the Commission, reaffirm that recommendation, with or without modification.

4. If, after a recommendation is reaffirmed, the Commission is unable to adopt the recommendation as a proposal, it shall send a copy of the recommendation to the Depositary Government with a report of the Commission's decision. The Depositary Government shall transmit copies of the recommendation and of the Commission's report to the Contracting Governments.

5. The Commission may, after consultation with all the Panels, transmit proposals to the Depositary Government within the scope of paragraph 1 of this Article affecting the Convention area as a whole.

6. The Depositary Government shall transmit any proposal received by it to the Contracting Governments for their consideration and may make such suggestions as will facilitate acceptance of the proposal.

7. The Contracting Governments shall notify the Depositary Government of their acceptance of the proposal, and the Depositary Government shall notify the Contracting Governments of each acceptance communicated to it, including the date of receipt thereof.

8. The proposal shall become effective for all Contracting Governments four months after the date on which notifications of acceptance shall have been received by the Depositary Government from all the Contracting Governments participating in the Panel or Panels for the sub-area or sub-areas to which the proposal applies.

9. At any time after the expiration of one year from the date on which a proposal becomes effective, any Panel Government for the sub-area to which the proposal applies may give to the Depositary Government notice of the termination of its acceptance of the proposal and, if that notice is not withdrawn, the proposal shall cease to be effective for that Panel Government at the end of one year from the date of receipt of the notice by the Depositary Government. At any time after a proposal has ceased to be effective for a Panel Government under this paragraph, the proposal shall cease to be effective for any other Contracting Government upon the date a notice of withdrawal by such Government is received by the Depositary Government. The Depositary Government shall notify all Contracting Governments of every notice under this paragraph immediately upon receipt thereof.

ARTICLE IX

The Commission may invite the attention of any or all Contracting Governments to any matters which relate to the objectives and purposes of this Convention.

ARTICLE X

1. The Commission shall seek to establish and maintain working arrangements with other public international organizations which have related objectives, particularly the Food and Agriculture Organization of the United Nations and the International Council for the Exploration of the Sea, to ensure effective collaboration and coordination with respect to their work and, in the case of the International Council for the Exploration of the Sea, the avoidance of duplication of scientific investigations.

2. The Commission shall consider, at the expiration of two years from the date of entry into force of this Convention, whether or not it should recommend to the Contracting Governments that the Commission be brought within the framework of a specialized agency of the United Nations.

ARTICLE XI

1. Each Contracting Government shall pay the expenses of the Commissioners, experts and advisers appointed by it.

2. The Commission shall prepare an annual administrative budget of the proposed necessary administrative expenditures of the Commission and an annual special projects budget of proposed expenditures on special studies and investigations to be undertaken by or on behalf of the Commission pursuant to Article VI or by or on behalf of any Panel pursuant to Article VII.

3. The Commission shall calculate the payments due from each Contracting Government under the annual administrative budget according to the following formula:

(a) from the administrative budget there shall be deducted a sum of 500 United States dollars for each Contracting Government;

(b) the remainder shall be divided into such number of equal shares as corresponds to the total number of Panel memberships;

(c) the payment due from any Contracting Government shall be the equivalent of 500 United States dollars plus the number of shares equal to the number of Panels in which that Government participates.

4. The Commission shall notify each Contracting Government the sum due from that Government as calculated under paragraph 3 of this Article and as soon as possible thereafter each Contracting Government shall pay to the Commission the sum so notified.

5. The annual special projects budget shall be allocated to the Contracting Governments according to a scale to be determined by agreement among the Contracting Governments, and the sums so allocated to any Contracting Government shall be paid to the Commission by that Government.

6. Contributions shall be payable in the currency of the country in which the seat of the Commission is located, except that the Commission may accept payment in the currencies in which it may be anticipated that expenditures of the Commission will be made from time to time, up to an amount established each year by the Commission in connection with the preparation of the annual budgets.

7. At its first meeting the Commission shall approve an administrative budget for the balance of the first financial year in which the Commission functions and shall transmit to the Contracting Governments copies of that budget together with notices of their respective allocations.

8. In subsequent financial years, the Commission shall submit to each Contracting Government drafts of the annual budgets together with a schedule of allocations, not less than six weeks before the annual meeting of the Commission at which the budgets are to be considered.

ARTICLE XII

The Contracting Governments agree to take such action as may be necessary to make effective the provisions of this Convention and to implement any proposals which become effective under paragraph 8 of Article VIII. Each Contracting Government shall transmit to the Commission a statement of the action taken by it for these purposes.

ARTICLE XIII

The Contracting Governments agree to invite the attention of any Government not a party to this Convention to any matter relating to the fishing activities in the Convention area of the nationals or vessels of that Government which appear to affect adversely the operations of the Commission or the carrying out of the objectives of this Convention.

ARTICLE XIV

The Annex, as attached to this Convention and as modified from time to time, forms an integral part of this Convention.

ARTICLE XV

1. This Convention shall be ratified by the signatory Governments and the instruments of ratification shall be deposited with the Government of the United States of America, referred to in this Convention as the "Depositary Government."

2. This Convention shall enter into force upon the deposit of instruments of ratification by four signatory Governments,* and shall enter into force with respect to each Government which subsequently ratifies on the date of the deposit of its instrument of ratification.

3. Any Government which has not signed this Convention may adhere thereto by a notification in writing to the Depositary Government. Adherences received by the Depositary Government prior to the date of entry into force of this Convention shall become effective on the date this Convention enters into force. Adherences received by the Depositary Government after the date of entry into force of this Convention shall become effective on the date of receipt by the Depositary Government.

4. The Depositary Government shall inform all signatory Governments and all adhering Governments of all ratifications deposited and adherences received.

5. The Depositary Government shall inform all Governments concerned of the date this Convention enters into force.

ARTICLE XVI

1. At any time after the expiration of ten years from the date of entry into force of this Convention, any Contracting Government may withdraw from the Convention on December thirty-first of any year by giving notice on or before the preceding June thirtieth to the Depositary Government which shall communicate copies of such notice to the other Contracting Governments.

* Fourth instrument of ratification deposited July 3, 1950, by Canada, ratification instruments having been previously deposited by Iceland, the United Kingdom and the United States.

2. Any other Contracting Government may thereupon withdraw from this Convention on the same December thirty-first by giving notice to the Depositary Government within one month of the receipt of a copy of a notice of withdrawal given pursuant to paragraph 1. of this Article.

ARTICLE XVII

1. The original of this Convention shall be deposited with the Government of the United States of America, which Government shall communicate certified copies thereof to all the signatory Governments and all the adhering Governments.

2. The Depositary Government shall register this Convention with the Secretariat of the United Nations.

3. This Convention shall bear the date on which it is opened for signature and shall remain open for signature for a period of fourteen days thereafter.

IN WITNESS WHEREOF the undersigned, having deposited their respective full powers, have signed this Convention.

DONE in Washington this eighth day of February 1949 in the English language.

FOR CANADA:

STEWART BATES

FOR DENMARK:

B DINESEN

FOR FRANCE:

With a reservation excluding paragraph 2 of Article I

M TERRIN

FOR ICELAND:

THOR THORS

FOR ITALY:

ALBERTO TARCHIANI

FOR HIS MAJESTY'S GOVERNMENT
IN THE UNITED KINGDOM AND THE
GOVERNMENT OF NEWFOUNDLAND
IN RESPECT OF NEWFOUNDLAND:

R GUSHUE

W. TEMPLEMAN

FOR NORWAY:

KLAUS SUNNANAA

GUNNAR ROLLEFSEN

OLAV LUND

FOR PORTUGAL:

MANUEL CARLOS QUINTÃO

MEYRELLES

ALFREDO DE MAGALHÃES RAMALHO

JOSÉ AUGUSTO CORREIA DE BARROS

AMÉRICO ANGELO TAVARES DE ALMEIDA

C frag

FOR SPAIN:

Reserving paragraph 2 of Article I

GERMÁN BARÁIBAR

FOR THE UNITED KINGDOM OF GREAT
BRITAIN AND NORTHERN IRELAND:

A. T. A. DOBSON

A. J. AGLIN

FOR THE UNITED STATES OF AMERICA:

W. M. CHAPMAN

WILLIAM E. S. FLORY

HILARY J. DEASON

FREDERICK L. ZIMMERMAN

ANNEX

1. The sub-areas provided for by Article I of this Convention shall be as follows:

Sub-area 1—That portion of the Convention area which lies to the north and east of a rhumb line from a point in 75°00' north latitude and 73°30' west longitude to a point in 69°00' north latitude and 59°00' west longitude; east of 59°00' west longitude; and to the north and east of a rhumb line from a point in 61°00' north latitude and 59°00' west longitude to a point in 52°15' north latitude and 42°00' west longitude.

Sub-area 2—That portion of the Convention area lying to the south and west of sub-area 1 defined above and to the north of the parallel of 52°15' north latitude.

Sub-area 3—That portion of the Convention area lying south of the parallel of 52°15' north latitude; and to the east of a line extending due north from Cape Bauld on the north coast of Newfoundland to 52°15' north latitude; to the north of the parallel of 39°00' north latitude; and to the east and north of a rhumb line extending in a northwesterly direction which passes through a point in 43°30' north latitude, 55°00' west longitude, in the direction of a point in 47°50' north latitude, 60°00' west longitude, until it intersects a straight line connecting Cape Ray, on the coast of Newfoundland, with Cape North on Cape Breton Island; thence in a northeasterly direction along said line to Cape Ray.

Sub-area 4—That portion of the Convention area lying to the west of sub-area 3 defined above, and to the east of a line described as follows: beginning at the terminus of the international boundary between the United States of America and Canada in Grand Manan Channel, at a point in 44°46'35.34" north latitude, 66°54'11.23" west longitude; thence due south to the parallel of 43°50' north latitude; thence due west to the meridian of 67°40' west longitude; thence due south to the parallel of 42°20' north latitude; thence due east to a point in 66°00' west longitude; thence along a rhumb line in a southeasterly direction to a point in 42°00' north latitude, 65°40' west longitude; thence due south to the parallel of 39°00' north latitude.

Sub-area 5—That portion of the Convention area lying west of the western boundary of sub-area 4 defined above.

2. For a period of two years from the date of entry into force of this Convention, Panel representation for each sub-area shall be as follows:

(a) *Sub-area 1*—Denmark, France, Italy, Norway, Portugal, Spain, United Kingdom;

(b) *Sub-area 2*—Denmark, France, Italy, Newfoundland;

(c) *Sub-area 3*—Canada, Denmark, France, Italy, Newfoundland, Portugal, Spain, United Kingdom;

(d) *Sub-area 4*—Canada, France, Italy, Newfoundland, Portugal, Spain, United States;

(e) *Sub-area 5*—Canada, United States;

it being understood that during the period between the signing of this Convention and the date of its entry into force, any signatory or adhering Government may, by notification to the Depositary Government, withdraw from the list of members of a Panel for any sub-area or be added to the list of members of the Panel for any sub-area on which it is not named. The Depositary Government shall inform all the other Governments concerned of all such notifications received and the memberships of the Panels shall be altered accordingly.

MEXICO-UNITED STATES

CONVENTION FOR THE ESTABLISHMENT OF AN INTERNATIONAL COMMISSION FOR THE SCIENTIFIC INVESTIGATION OF TUNA¹

Signed at Mexico City, January 25, 1949; ratifications exchanged at Washington, July 11, 1950; in force July 11, 1950

PREAMBLE

The United States of America and the United Mexican States considering their respective interests in maintaining the populations of certain tuna and tuna-like fishes in the waters of the Pacific Ocean off the coasts of both countries, and desiring to cooperate in scientific investigation, and in the gathering and interpretation of factual information to facilitate maintaining the populations of these fishes at a level which will permit the maximum reasonable utilization without depletion year after year, have agreed to conclude a Convention for these purposes and to that end have named as their Plenipotentiaries:

The President of the United States of America:

Walter Thurston, Ambassador Extraordinary and Plenipotentiary of the United States of America in Mexico;

The President of the United Mexican States:

Manuel Tello, acting Secretary of Foreign Relations; who, having communicated to each other their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

1. The High Contracting Parties agree to establish and operate a joint commission, to be known as the International Commission for the Scientific Investigation of Tuna, hereinafter referred to as the Commission, which shall carry out the objectives of this Convention. The Commission shall be composed of two national sections, a United States section, consisting of four members, appointed by the Government of the United States of America, and a Mexican section consisting of four members, appointed by the Government of the United Mexican States.

2. The Commission shall submit annually to the respective Governments a report on its findings, with appropriate recommendations, and shall also

¹ Department of State, Treaties and Other International Acts Series, No. 2094 (Pub. 3947).

inform them, whenever it is deemed advisable, on any matter relating to the objectives of this Convention.

3. The expenses incurred by each national section for its own personnel, offices and operation, including emoluments, transportation and subsistence, shall be borne by its government. Joint expenses incurred by the Commission shall be paid by the High Contracting Parties in the form and proportion recommended by the Commission and approved by the High Contracting Parties.

4. Both the general annual program of activities and the budget of joint expenses shall be recommended by the Commission and submitted for approval to the High Contracting Parties.

5. The High Contracting Parties shall decide on the most convenient place for the establishment of the Commission's headquarters.

6. The Commission shall meet at least twice each year and at such other times as may be requested by either national section. The date and place of the first meeting shall be determined by agreement between the High Contracting Parties.

7. At its first meeting the Commission shall select a chairman from the members of one national section and a secretary from the members of the other national section. The chairman and secretary shall hold office for a period of one year. During succeeding years, selection of the chairman and secretary shall alternate between the respective national sections.

8. Each national section shall have one vote. Decisions, resolutions, and recommendations of the Commission shall be made only by approval of both sections.

9. The Commission shall be entitled to adopt and to amend subsequently, as occasion may require, by-laws or rules for the conduct of its meetings and for the performance of its functions and duties. Such by-laws, rules or amendments shall be referred by the Commission to the Governments and shall become effective thirty days from the date of receipt of notification unless disapproved by either of the two Governments within that period.

10. The Commission shall be entitled to employ necessary personnel for the performance of its functions and duties. The appointments shall be distributed equitably between nationals of the United States and Mexico except in special instances in which the appointment of persons of other nationalities is desirable.

11. Each section of the Commission may appoint its own advisors who may attend sessions of the Commission in their advisory capacity when the Commission so determines. Each section may meet separately with advisors from its own country when it deems such meetings desirable.

12. Each section of the Commission may hold public hearings within the territory of its own country.

13. The Commission shall designate simultaneously a Director and an

Assistant Director of Investigations, who shall be technically competent and shall be responsible to the Commission. One of these functionaries shall be a national of the United States and the other a national of Mexico. Subject to the instruction of the Commission and with its approval, the Director shall have charge of:

- (a) the drafting of programs of investigation, and the preparation of budget estimates for the Commission;
- (b) authorizing the disbursement of the funds for the joint expenses of the Commission;
- (c) the accounting of the funds for the joint expenses of the Commission;
- (d) the appointment and immediate direction of technical and any other personnel required for the scientific functions of the Commission;
- (e) arrangements for the cooperation with other organizations or individuals in accordance with paragraph 18 of this Article;
- (f) the coordination of the work of the Commission with that of organizations and individuals whose cooperation has been arranged for;
- (g) the drafting of administrative, scientific and other reports for the Commission;
- (h) the performance of such other duties as the Commission may require.

14. The Assistant Director shall assist the Director of Investigations in all his functions, and shall substitute for him during his temporary absences. Both the Director and the Assistant Director of Investigations may be freely removed by the Commission.

15. The official languages of the Commission shall be English and Spanish, and members of the Commission may use either language during meetings. When necessary, translation shall be made to the other language. The minutes, official documents and publications of the Commission shall be in both languages, but official correspondence of the Commission may be written at the discretion of the secretary in either language.

16. Representatives of both national sections shall be entitled to participate in all work carried out by the Commission or under its auspices.

17. Each national section shall be entitled to obtain certified copies of any documents pertaining to the Commission except that the Commission will adopt and may amend subsequently rules to insure the confidential character of records of statistics of individual catches and individual company operations. These rules and amendments shall be referred to the Governments in accordance with the procedures of paragraph 9 of this Article.

18. In the performance of its duties and functions the Commission may request the technical and scientific services of and information from official agencies of the High Contracting Parties and any international, public, or private institution or organization or any private individual.

ARTICLE II

The Commission shall perform the following functions and duties:

1. Make investigations: (a) concerning the abundance, biology, biometry, and ecology of the yellowfin, bluefin, and albacore tunas, bonitos, yellow-tails, and skipjacks (hereinafter referred to as tuna and tuna-like fishes) in the waters of the Pacific Ocean off the coasts of both countries and elsewhere as may be required, and of the kinds of fishes commonly used as bait in tuna fishing; and (b) concerning the effects of natural factors and human activities on the abundance of the populations of fishes to which this Convention refers.

2. Collect and analyze information relating to the current and past conditions and trends of the populations of the tuna and tuna-like fishes and tuna-bait fishes of the waters of the Pacific Ocean off the coasts of both countries and elsewhere as may be required.

3. Study and appraise information concerning methods and procedures for maintaining and increasing the populations of tuna and tuna-like fishes and tuna-bait fishes in the waters of the Pacific Ocean off the coasts of both countries and elsewhere as may be required.

4. Conduct such fishing and other activities, on the high seas and in the waters which are under the jurisdiction of either High Contracting Party, as may be necessary to attain the ends referred to in sub-paragraphs 1, 2 and 3 of this Article.

5. Obtain statistics and all kinds of reports concerning catches, operations of fishing boats and other information concerning the fishing for tuna and tuna-like fishes and the tuna-bait fishes. The High Contracting parties shall, if necessary, enact legislation in order to make it obligatory for the boat captains or other persons who participate in these fishing activities to keep records of operations, including the volume of the catch by species and the area in which caught, all of these in the form and with such frequency as the Commission deems necessary.

6. Publish or otherwise disseminate reports relative to the results of its findings and such other reports as fall within the scope of this Convention, as well as scientific, statistical, and other data relating to the fisheries for tuna and tuna-like fishes and tuna-bait fishes in the waters of the Pacific Ocean off the coasts of both countries and elsewhere as may be required.

ARTICLE III

1. The present Convention shall be ratified in accordance with the constitutional procedures of each country and the instruments of ratification shall be exchanged at Washington as soon as possible.

2. The present Convention shall enter into force on the date of exchange of ratifications. It shall remain in force for a period of four years and

thereafter until one year from the day on which either of the High Contracting Parties shall give notice to the other High Contracting Party of its intention of terminating the Convention.

3. In the event of termination of the Convention, property supplied to the Commission by the High Contracting Parties shall be returned to that High Contracting Party which originally provided it. Property otherwise acquired by the Commission, with the exception of the archives, shall be returned to the High Contracting Parties taking into account the proportion in which they shall have contributed to the expenses of the Commission.

4. At the termination of this Convention the High Contracting Parties shall divide the archives of the Commission as follows: The United States of America shall receive the part in English and the United Mexican States, the part in Spanish. Either of the two countries shall be able to obtain certified copies of any document from the archives of the Commission which is in the possession of the other. These archives may be consulted at any time for this purpose by authorized representatives of the government not having in its possession the archives which it wishes to consult. This paragraph shall be subject to the provisions of Paragraph 17 of Article I of this Convention.

In witness whereof the respective Plenipotentiaries have signed the present Convention and have affixed their seals.

Done in duplicate, in the English and Spanish Languages,* at Mexico City this twenty-fifth day of January, one thousand nine hundred and forty-nine.

WALTER THURSTON

[SEAL]

EXCHANGE OF NOTES

Signed at Mexico City, January 26 and 31, 1949

The American Ambassador to the Mexican Acting Minister for Foreign Relations

EMBASSY OF THE
UNITED STATES OF AMERICA
Mexico, D. F., January 26, 1949.

No. 2835

EXCELLENCY:

I have the honor to refer to the recent negotiations which have culminated in the signing, on Tuesday, January 25, 1949, of the Convention for the Establishment of an International Commission for the Scientific Investigation of Tuna.

* Spanish text omitted here.

During the course of the negotiations which now have successfully been concluded, two understandings were reached with regard to the proper interpretation of Paragraphs 7 and 9 of Article I of the Convention. It was agreed that these understandings should be made of record through an exchange of notes.

With regard to Paragraph 7 of Article I, it is the understanding of my Government that the Commission shall be instructed to arrange for the selection of the Chairman in such a manner as to insure that the Director of Investigations will be of the other nationality during the first year.

Concerning Paragraph 9 of Article I it is the understanding of my Government that, with regard to the receipt of notifications from the Commission by the two governments, and in the event such notifications are received on different dates, the thirty day time limit shall count from the later date, thereby avoiding any confusion which might arise as to which date would be applicable.

Your Excellency's affirmative answer to this present note would constitute the desired exchange.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest and most distinguished consideration.

WALTER THURSTON

His Excellency

Señor MANUEL TELLO,

*Acting Minister for Foreign Relations,
México, D. F.*

[*Translation*]

MINISTRY OF FOREIGN RELATIONS
UNITED MEXICAN STATES
MEXICO

51620

MEXICO, D. F., *January 31, 1949.*

MR. AMBASSADOR:

I have the honor to acknowledge receipt of Your Excellency's note No. 2835 which you addressed to me on the 26th instant. In the aforementioned note Your Excellency referred to the negotiations which led to the Convention for the establishment of an International Commission for Scientific Research on Tuna, which was signed on January 25, 1948.*

Two points regarding this Convention were left pending, to be settled by an exchange of notes between both Governments, for the purpose of defining the exact sense of sub-paragraphs 7 and 9 of article I.

* Spanish original reads: "Convención para el establecimiento de una Comisión Internacional para la Investigación Científica del Atún, la cual fué firmada el 25 de enero anterior."

With regard to the first of the aforementioned sub-paragraphs, I am pleased to inform Your Excellency that, in accordance with what was agreed, the Mexican Commissioners shall be instructed in due time so that in the first year the designation of Chairman of the Commission and of Director of Research ** will be effected simultaneously and in such a manner that the appointments will be given to persons of different nationality.

I am also pleased to inform Your Excellency, with regard to sub-paragraph 9 of the above-mentioned article I of the Convention, that my Government is in complete agreement with the interpretation of Your Excellency's Government, regarding the period for expressing disagreement, if any, with respect to the Statutes, Regulations and amendments thereto, which the Commission, under sub-paragraph 9, may submit to the Governments. The Mexican Government, like Your Excellency's, understands that in case such notifications are received by the Governments on different dates, the period of thirty days indicated in the aforementioned sub-paragraph will be computed beginning with the later of the above-mentioned dates, in order to avoid any confusion which might arise as to which would be the applicable date.

I assure Your Excellency of my highest and most distinguished consideration.

MANUEL TELLO

His Excellency

WALTER THURSTON,

*Ambassador Extraordinary and Plenipotentiary,
Embassy of the United States of America,
City.*

** Original Spanish: Investigaciones.

UNITED STATES
INTERNATIONAL CLAIMS SETTLEMENT ACT OF 1949¹

Approved March 10, 1950

AN ACT

TO PROVIDE FOR THE SETTLEMENT OF CERTAIN CLAIMS OF THE GOVERNMENT OF
THE UNITED STATES ON ITS OWN BEHALF AND ON BEHALF OF AMERICAN NA-
TIONALS AGAINST FOREIGN GOVERNMENTS

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "International Claims Settlement Act of 1949."

SEC. 2. For the purposes of this Act—

(a) The term "person" shall include an individual, partnership, corporation, or the Government of the United States.

(b) The term "United States" when used in a geographical sense shall include the United States, its Territories and insular possessions, and the Canal Zone.

(c) The term "nationals of the United States" includes (1) persons who are citizens of the United States, and (2) persons who, though not citizens of the United States, owe permanent allegiance to the United States. It does not include aliens.

(d) The term "Yugoslav Claims Agreement of 1948" means the agreement between the Governments of the United States of America and of the Federal People's Republic of Yugoslavia regarding pecuniary claims of the United States and its nationals, signed July 19, 1948.

SEC. 3. (a) There is hereby established in the Department of State a commission to be known as the International Claims Commission of the United States (hereinafter referred to as the "Commission") and to be composed of three persons, to be appointed by the President by and with the advice and consent of the Senate. One of such members shall be designated by the President as the Chairman of the Commission and each shall receive compensation at the rate of \$15,000 per annum. Two members of the Commission shall constitute a quorum for the transaction of business. Any vacancy that may occur in the membership of the Commission shall be filled in the same manner as in the case of an original appointment: *Pro-*

¹ Public Law 455, 81st Cong., 2d Sess. (H.R. 4406).

vided, That in the event of the death, resignation, absence, or disability of a member, the President may designate an acting member from among persons in the judicial or in the executive branch of the Government (including employees of the Commission), who possess the qualifications prescribed by this subsection, to temporarily perform without additional compensation the duties of the member until a successor is appointed or the absence or disability of the member shall cease.

(b) The principal office of the Commission shall be in the District of Columbia. The Secretary of State, in accordance with the provisions of the civil-service laws and the Classification Act of 1923, as amended, upon the recommendation of the Commission, may appoint and fix the compensation of an executive director, and of officers, attorneys, investigators, and other employees.

(c) The Commission may prescribe such rules and regulations as may be necessary to enable it to carry out its functions, and may delegate functions to any member, officer, or employee of the Commission. The President may fix a termination date for the authority of the Commission, and the terms of office of its members under this Act. Any member of the Commission may be removed by the Secretary of State, upon notice and hearing, for neglect of duty, or malfeasance in office, but for no other cause. Not later than six months after its organization, and every six months thereafter, the Commission shall make a report, through the Secretary of State, to the Congress concerning its operations under this Act. The Commission shall, upon completion of its work, certify in duplicate to the Secretary of State and to the Secretary of the Treasury the following: (1) A list of all claims disallowed; (2) a list of all claims allowed, in whole or in part, together with the amount of each claim and the amount awarded thereon; and (3) a copy of the decision rendered in each case.

SEC. 4. (a) The Commission shall have jurisdiction to receive, examine, adjudicate, and render final decisions with respect to claims of the Government of the United States and of nationals of the United States included within the terms of the Yugoslav Claims Agreement of 1948, or included within the terms of any claims agreement hereafter concluded between the Government of the United States and a foreign government (exclusive of governments against which the United States declared the existence of a state of war during World War II) similarly providing for the settlement and discharge of claims of the Government of the United States and of nationals of the United States against a foreign government, arising out of the nationalization or other taking of property, by the agreement of the Government of the United States to accept from that government a sum in en bloc settlement thereof. In the decision of claims under this Act, the Commission shall apply the following in the following order: (1) The provisions of the applicable claims agreement as provided in this subsection; and (2) the applicable principles of international law, justice, and equity.

(b) The Commission shall give public notice of the time when, and the limit of time within which, claims may be filed, which notice shall be published in the Federal Register. In addition, the Commission is authorized and directed to mail a similar notice to the last-known address of each person appearing in the records of the Department of State as having indicated an intention of filing a claim with respect to a matter concerning which the Commission has jurisdiction under this Act. All decisions shall be upon such evidence and written legal contentions as may be presented within such period as may be prescribed therefor by the Commission, and upon the results of any independent investigation of cases which the Commission may deem it advisable to make. Each decision by the Commission pursuant to this Act shall be by majority vote, and shall state the reason for such decision, and shall constitute a full and final disposition of the case in which the decision is rendered.

(c) Any member of the Commission, or any employee of the Commission designated in writing by the Chairman of the Commission, may administer oaths and examine witnesses. Any member of the Commission may require by subpoena the attendance and testimony of witnesses, and the production of all necessary books, papers, documents, records, correspondence, and other evidence, from any place in the United States at any designated place of inquiry or of hearing. The Commission is authorized to contract for the reporting of inquiries or of hearings. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of disobedience to a subpoena, the aid of any district court of the United States, as constituted by chapter 5 of title 28, United States Code (28 U. S. C. 81 and the following), and the United States court of any Territory or other place subject to the jurisdiction of the United States may be invoked in requiring the attendance and testimony of witnesses and the production of such books, papers, documents, records, correspondence, and other evidence. Any such court within the jurisdiction of which the inquiry or hearing is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) The Commission may order testimony to be taken by deposition in any inquiry or hearing pending before it at any stage of such proceeding or hearing. Such depositions may be taken, under such regulations as the Commission may prescribe, before any person designated by the Commission and having power to administer oaths. Any person may be compelled to appear and depose, and to produce books, papers, documents, records, correspondence, and other evidence in the same way as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinabove provided. If a witness whose testimony

may be desired to be taken by deposition be in a foreign country, the deposition may be taken, provided the laws of the foreign country so permit, by a consular officer, or by an officer or employee of the Commission, or other person commissioned by the Commission, or under letters rogatory issued by the Commission. Witnesses whose depositions are taken as authorized in this subsection, and the persons taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(e) In addition to the penalties provided in title 18, United States Code, section 1001, any person guilty of any act, as provided therein, with respect to any matter under this Act, shall forfeit all rights under this Act, and, if payment shall have been made or granted, the Commission shall take such action as may be necessary to recover the same.

(f) In connection with any claim decided by the Commission pursuant to this Act in which an award is made, the Commission may, upon the written request of the claimant or any attorney heretofore or hereafter employed by such claimant, determine and apportion the just and reasonable attorney's fees for services rendered with respect to such claim, but the total amount of the fees so determined in any case shall not exceed 10 per centum of the total amount paid pursuant to the award. Written evidence that the claimant and any such attorney have agreed to the amount of the attorney's fees shall be conclusive upon the Commission: *Provided, however,* That the total amount of the fees so agreed upon does not exceed 10 per centum of the total amount paid pursuant to the award. Any fee so determined shall be entered as a part of such award, and payment thereof shall be made by the Secretary of the Treasury by deducting the amount thereof from the total amount paid pursuant to the award. Any agreement to the contrary shall be unlawful and void. The Commission is authorized and directed to mail to each claimant in proceedings before the Commission notice of the provisions of this subsection. Whoever, in the United States or elsewhere, pays or offers to pay, or promises to pay, or receives on account of services rendered or to be rendered in connection with any such claim, compensation which, when added to any amount previously paid on account of such services, will exceed the amount of fees so determined by the Commission, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than \$5,000 or imprisoned not more than twelve months, or both, and if any such payment shall have been made or granted, the Commission shall take such action as may be necessary to recover the same, and, in addition thereto, any such person shall forfeit all rights under this Act.

(g) The Attorney General shall assign such officers and employees of the Department of Justice as may be necessary to represent the United States as to any claims of the Government of the United States with respect to which the Commission has jurisdiction under this Act. Any and all payments required to be made by the Secretary of the Treasury under this Act

pursuant to any award made by the Commission to the Government of the United States shall be covered into the Treasury to the credit of miscellaneous receipts.

(h) The Commission shall notify all claimants of the approval or denial of their claims, stating the reasons and grounds therefor, and, if approved, shall notify such claimants of the amount for which such claims are approved. Any claimant whose claim is denied, or is approved for less than the full amount of such claim, shall be entitled, under such regulations as the Commission may prescribe, to a hearing before the Commission, or its duly authorized representatives, with respect to such claim. Upon such hearing, the Commission may affirm, modify, or revise its former action with respect to such claim, including a denial or reduction in the amount theretofore allowed with respect to such claim. The action of the Commission in allowing or denying any claim under this Act shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise.

(i) The Commission may in its discretion enter an award with respect to one or more items deemed to have been clearly established in an individual claim while deferring consideration and action on other items of the same claim.

(j) The Commission shall comply with the provisions of the Administrative Procedure Act of 1946 except as otherwise specifically provided by this Act.

SEC. 5. The Commission shall, as soon as possible, and in the order of the making of such awards, certify to the Secretary of the Treasury and to the Secretary of State copies of the awards made in favor of the Government of the United States or of nationals of the United States under this Act. The Commission shall certify to the Secretary of State, upon his request, copies of the formal submissions of claims filed pursuant to subsection (b) of section 4 of this Act for transmission to the foreign government concerned.

SEC. 6. The Commission shall complete its affairs in connection with settlement of United States-Yugoslav claims arising under the Yugoslav Claims Agreement of 1948 not later than four years following the effective date of this Act: *Provided*, That nothing in this provision shall be construed to limit the life of the Commission, or its authority to act on future agreements which may be effected under the provisions of this legislation.

SEC. 7. (a) Subject to the limitations hereinafter provided, the Secretary of the Treasury is authorized and directed to pay, as prescribed by section 8 of this Act, an amount not exceeding the principal of each award, plus accrued interest on such awards as bear interest, certified pursuant to section 5 of this Act, in accordance with the award. Such payments, and ap-

plications for such payments, shall be made in accordance with such regulations as the Secretary of the Treasury may prescribe.

(b) There shall be deducted from the amount of each payment made pursuant to subsection (c) of section 8, as reimbursement for the expenses incurred by the United States, an amount equal to 3 per centum of such payment. All amounts so deducted shall be covered into the Treasury to the credit of miscellaneous receipts.

(c) Payments made pursuant to this Act shall be made only to the person or persons on behalf of whom the award is made, except that—

(1) if such person is deceased or is under a legal disability, payment shall be made to his legal representative: *Provided*, That if the total award is not over \$500 and there is no qualified executor or administrator, payment may be made to the person or persons found by the Comptroller General of the United States to be entitled thereto, without the necessity of compliance with the requirements of law with respect to the administration of estates;

(2) in the case of a partnership or corporation, the existence of which has been terminated and on behalf of which an award is made, payment shall be made, except as provided in paragraphs (3) and (4), to the person or persons found by the Comptroller General of the United States to be entitled thereto;

(3) if a receiver or trustee for any such partnership or corporation has been duly appointed by a court of competent jurisdiction in the United States and has not been discharged prior to the date of payment, payment shall be made to such receiver or trustee in accordance with the order of the court;

(4) if a receiver or trustee for any such partnership or corporation, duly appointed by a court of competent jurisdiction in the United States, makes an assignment of the claim, or any part thereof, with respect to which an award is made, or makes an assignment of such award, or any part thereof, payment, shall be made to the assignee, as his interest may appear; and

(5) in the case of any assignment of an award, or any part thereof, which is made in writing and duly acknowledged and filed, after such award is certified to the Secretary of the Treasury, payment may, in the discretion of the Secretary of the Treasury, be made to the assignee, as his interest may appear.

(d) Whenever the Secretary of the Treasury, or the Comptroller General of the United States, as the case may be, shall find that any person is entitled to any such payment, after such payment shall have been received by such person, it shall be an absolute bar to recovery by any other person against the United States, its officers, agents, or employees with respect to such payment.

(e) Any person who makes application for any such payment shall be held to have consented to all the provisions of this Act.

(f) Nothing in this Act shall be construed as the assumption of any liability by the United States for the payment or satisfaction, in whole or

in part, of any claim on behalf of any national of the United States against any foreign government.

SEC. 8. (a) There are hereby created in the Treasury of the United States (1) a special fund to be known as the Yugoslav Claims Fund; and (2) such other special funds as may, in the discretion of the Secretary of the Treasury, be required, each to be a claims fund to be known by the name of the foreign government which has entered into a settlement agreement with the Government of the United States as described in subsection (a) of section 4 of this Act. There shall be covered into the Treasury to the credit of the proper special fund all funds hereinafter specified. All payments authorized under section 7 of this Act shall be disbursed from the proper fund, as the case may be, and all amounts covered into the Treasury to the credit of the aforesaid funds are hereby permanently appropriated for the making of the payments authorized by section 7 of this Act.

(b) The Secretary of the Treasury is authorized and directed to cover into—

(1) the Yugoslav Claims Fund the sum of \$17,000,000 being the amount paid by the Government of the Federal People's Republic of Yugoslavia pursuant to the Yugoslav Claims Agreement of 1948;

(2) a special fund created for that purpose pursuant to subsection (a) of this section any amounts hereafter paid, in United States dollars, by a foreign government which has entered into a claims settlement agreement with the Government of the United States as described in subsection (a) of section 4 of this Act.

(c) The Secretary of the Treasury is authorized and directed out of the sums covered into any of the funds pursuant to subsection (b) of this section, and after making the deduction provided for in section 7 (b) of this Act—

(1) to make payments in full of the principal of awards of \$1,000 or less, certified pursuant to section 5 of this Act;

(2) to make payments of \$1,000 on the principal of each award of more than \$1,000 in principal amount, certified pursuant to section 5 of this Act;

(3) to make additional payment of not to exceed 25 per centum of the unpaid principal of awards in the principal amount of more than \$1,000;

(4) after completing the payments prescribed by paragraphs (2) and (3) of this subsection, to make payments, from time to time in ratable proportions, on account of the unpaid principal of all awards in the principal amount of more than \$1,000, according to the proportions which the unpaid principal of such awards bear to the total amount in the fund available for distribution at the time such payments are made; and

(5) after payment has been made of the principal amounts of all such awards, to make pro rata payments on account of accrued interest on such awards as bear interest.

(d) The Secretary of the Treasury, upon the concurrence of the Secretary of State, is authorized and directed, out of the sum covered into the Yugoslav Claims Fund pursuant to subsection (b) of this section, after completing the payments of such funds pursuant to subsection (c) of this section, to make payment of the balance of any sum remaining in such fund to the Government of the Federal People's Republic of Yugoslavia to the extent required under article 1 (c) of the Yugoslav Claims Agreement of 1948. The Secretary of State shall certify to the Secretary of the Treasury the total cost of adjudication, not borne by the claimants, attributable to the Yugoslav Claims Agreement of 1948. Such certification shall be final and conclusive and shall not be subject to review by any other official, or department, agency, or establishment of the United States.

SEC. 9. There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary to enable the Commission to carry out its functions under this Act.

Approved March 10, 1950.

ACT FOR INTERNATIONAL DEVELOPMENT ¹

Approved June 5, 1950

SEC. 401. This title may be cited as the "Act for International Development."

SEC. 402. The Congress hereby finds as follows:

(a) The peoples of the United States and other nations have a common interest in the freedom and in the economic and social progress of all peoples. Such progress can further the secure growth of democratic ways of life, the expansion of mutually beneficial commerce, the development of international understanding and good will, and the maintenance of world peace.

(b) The efforts of the peoples living in economically underdeveloped areas of the world to realize their full capabilities and to develop the resources of the lands in which they live can be furthered through the cooperative endeavor of all nations to exchange technical knowledge and skills and to encourage the flow of investment capital.

(c) Technical assistance and capital investment can make maximum contribution to economic development only where there is understanding of the mutual advantages of such assistance and investment and where there is confidence of fair and reasonable treatment and due respect for the legitimate interests of the peoples of the countries to which the assistance is given and in which the investment is made and of the countries from which the assistance and investments are derived. In the case of investment this involves confidence on the part of the people of the underdeveloped areas that investors will conserve as well as de-

¹ Title IV, Foreign Economic Assistance Act of 1950, Public Law 535, 81st Cong., 2d Sess. (H. R. 7797).

velop local resources, will bear a fair share of local taxes and observe local laws, and will provide adequate wages and working conditions for local labor. It involves confidence on the part of investors, through intergovernmental agreements or otherwise, that they will not be deprived of their property without prompt, adequate, and effective compensation; that they will be given reasonable opportunity to remit their earnings and withdraw their capital; that they will have reasonable freedom to manage, operate, and control their enterprises; that they will enjoy security in the protection of their persons and property, including industrial and intellectual property, and nondiscriminatory treatment in taxation and in the conduct of their business affairs.

SEC. 403. (a) It is declared to be the policy of the United States to aid the efforts of the peoples of economically underdeveloped areas to develop their resources and improve their working and living conditions by encouraging the exchange of technical knowledge and skills and the flow of investment capital to countries which provide conditions under which such technical assistance and capital can effectively and constructively contribute to raising standards of living, creating new sources of wealth, increasing productivity and expanding purchasing power.

(b) It is further declared to be the policy of the United States that in order to achieve the most effective utilization of the resources of the United States, private and public, which are or may be available for aid in the development of economically underdeveloped areas, agencies of the United States Government, in reviewing requests of foreign governments for aid for such purposes, shall take into consideration (1) whether the assistance applied for is an appropriate part of a program reasonably designed to contribute to the balanced and integrated development of the country or area concerned; (2) whether any works or facilities which may be projected are actually needed in view of similar facilities existing in the area and are otherwise economically sound; and (3) with respect to projects for which capital is requested, whether private capital is available either in the country or elsewhere upon reasonable terms and in sufficient amounts to finance such projects.

SEC. 404. (a) In order to accomplish the purposes of this title, the United States is authorized to participate in multilateral technical cooperation programs carried on by the United Nations, the Organization of American States, and their related organizations, and by other international organizations, wherever practicable.

(b) Within the limits of appropriations made available to carry out the purposes of this title, the President is authorized to make contributions to the United Nations for technical cooperation programs carried on by it and its related organizations which will contribute to accomplishing the purposes of this title as effectively as would participation in comparable programs on a bilateral basis. The President is further authorized to make contributions for technical cooperation programs carried on by the Organization of

American States, its related organizations, and by other international organizations.

(c) Agencies of the United States Government on request of international organizations are authorized, upon approval by the President, to furnish services and such facilities as may be necessary in connection therewith, on an advance of funds or reimbursement basis, for such organizations in connection with their technical cooperation programs. Amounts received as reimbursements from such organizations shall be credited, at the option of the appropriate agency, either to the appropriation, fund, or account utilized in incurring the obligation, or to an appropriate appropriation, fund, or account currently available for the purposes for which expenditures were made.

SEC. 405. The President is authorized to plan, undertake, administer, and execute bilateral technical cooperation programs carried on by any United States Government agency and, in so doing—

(a) To coordinate and direct existing and new technical cooperation programs.

(b) To assist other interested governments in the formulation of programs for the balanced and integrated development of the economic resources and productive capacities of economically underdeveloped areas.

(c) To receive, consider, and review reports of joint commissions set up as provided in section 410 of this title.

(d) To make, within appropriations made available for the purpose, advances and grants in aid of technical cooperation programs to any person, corporation, or other body of persons, or to any foreign government or foreign government agency.

(e) To make and perform contracts or agreements in respect of technical cooperation programs on behalf of the United States Government with any person, corporation, or other body of persons however designated, whether within or without the United States, or with any foreign government or foreign government agency: *Provided*, That with respect to contracts or agreements which entail commitments for the expenditure of funds appropriated pursuant to the authority of this title, such contracts or agreements, within the limits of appropriations or contract authorizations hereafter made available may, subject to any future action of the Congress, run for not to exceed three years in any one case.

(f) To provide for printing and binding outside the continental limits of the United States, without regard to section 11 of the Act of March 1, 1919 (44 U. S. C. 111).

(g) To provide for the publication of information made available by the joint commissions referred to in section 410, and from other sources, regarding resources, opportunities for private investment capital, and the need for technical knowledge and skill in each participating country.

SEC. 406. Agreements made by the United States under the authority of this title with other governments and with international organizations shall

be registered with the Secretariat of the United Nations in accordance with the provisions of article 102 of the United Nations Charter.

SEC. 407. In carrying out the programs authorized in section 405 of this title—

(a) The participation of private agencies and persons shall be sought to the greatest extent practicable.

(b) Due regard shall be given, in reviewing requests for assistance, to the possibilities of achieving satisfactory results from such assistance as evidenced by the desire of the country requesting it (1) to take steps necessary to make effective use of the assistance made available, including the encouragement of the flow of productive local and foreign investment capital where needed for development; and (2) to endeavor to facilitate the development of the colonies, possessions, dependencies, and non-self-governing territories administered by such requesting country so that such areas may make adequate contribution to the effectiveness of the assistance requested.

(c) Assistance shall be made available only where the President determines that the country being assisted—

(1) Pays a fair share of the cost of the program.

(2) Provides all necessary information concerning such program and gives the program full publicity.

(3) Seeks to the maximum extent possible full coordination and integration of technical cooperation programs being carried on in that country.

(4) Endeavors to make effective use of the results of the program.

(5) Cooperates with other countries participating in the program in the mutual exchange of technical knowledge and skills.

SEC. 408. The President is authorized to prescribe such rules and regulations as may be necessary and proper to carry out the provisions of this title.

SEC. 409. The President shall create an advisory board, hereinafter referred to as the "board," which shall advise and consult with the President or such other officer as he may designate to administer the program herein authorized, with respect to general or basic policy matters arising in connection with operation of the program. The board shall consist of not more than thirteen members to be appointed by the President, one of whom, by and with the advice and consent of the Senate, shall be appointed by him as chairman. The members of the board shall be broadly representative of voluntary agencies and other groups interested in the program, including business, labor, agriculture, public health, and education. All members of the board shall be citizens of the United States; none except the chairman shall be an officer or an employee of the United States (including any agency or instrumentality of the United States) who as such regularly receives compensation for current services. Members of the board, other than the chairman if he is an officer of the United States Government, shall receive out of funds made available for the purposes of this title a per diem allow-

ance of \$50 for each day spent away from their homes or regular places of business for the purpose of attendance at meetings of the board or at conferences held upon the call of the chairman, and in necessary travel, and while so engaged they may be paid actual travel expenses and not to exceed \$10 per diem in lieu of subsistence and other expenses. The President may appoint such committees in special fields of activity as he may determine to be necessary or desirable to effectuate the purposes of this title. The members of such committees shall receive the same compensation as that provided for members of the board.

SEC. 410. (a) At the request of a foreign country, there may be established a joint commission for economic development to be composed of persons named by the President and persons to be named by the requesting country, and may include representatives of international organizations mutually agreed upon.

(b) The duties of each such joint commission shall be mutually agreed upon, and may include, among other things, examination of the following:

(1) The requesting country's requirements with respect to technical assistance.

(2) The requesting country's resources and potentialities, including mutually advantageous opportunities for utilization of foreign technical knowledge and skills and investment.

(3) Policies which will remove deterrents to and otherwise encourage the introduction, local development, and application of technical skills and the creation and effective utilization of capital, both domestic and foreign; and the implementation of such policies by appropriate measures on the part of the requesting country and the United States, and of other countries, when appropriate, and after consultation with them.

(c) Such joint commissions shall prepare studies and reports which they shall transmit to the appropriate authorities of the United States and of the requesting countries. In such reports the joint commissions may include recommendations as to any specific projects which they conclude would contribute to the economic development of the requesting countries.

(d) The costs of each joint commission shall be borne by the United States and the requesting country in the proportion that may be agreed upon between the President and that country.

SEC. 411. All or part of United States support for and participation in any technical cooperation program carried on under this title shall be terminated by the President—

(a) If he determines that such support and participation no longer contribute effectively to the purposes of this title, are contrary to a resolution adopted by the General Assembly of the United Nations that the continuance of such technical cooperation programs is unnecessary or undesirable, or are not consistent with the foreign policy of the United States.

(b) If a concurrent resolution of both Houses of the Congress finds such termination is desirable.

SEC. 412. The President may exercise any power or authority conferred on him by this title through the Secretary of State or through any other officer or employee of the United States Government.

SEC. 413. In order to carry out the purposes of this title—

(a) The President shall appoint, by and with the advice and consent of the Senate, a person who, under the direction of the President or such other officer as he may designate pursuant to section 412 hereof to exercise the powers conferred upon him by this title, shall be responsible for planning, implementing, and managing the programs authorized in this title. He shall be compensated at a rate fixed by the President without regard to the Classification Act of 1949 but not in excess of \$15,000 per annum.

(b) Officers, employees, agents, and attorneys may be employed for duty within the continental limits of the United States in accordance with the provisions of the civil-service laws and the Classification Act of 1949.

(c) Persons employed for duty outside the continental limits of the United States and officers and employees of the United States Government assigned for such duty, may receive compensation at any of the rates provided for the Foreign Service Reserve and Staff by the Foreign Service Act of 1946 (60 Stat. 999), as amended, may receive allowances and benefits not in excess of those established thereunder, and may be appointed to any class in the Foreign Service Reserve or Staff in accordance with the provisions of such Act.

(d) Alien clerks and employees employed for the purpose of performing functions under this title shall be employed in accordance with the provisions of the Foreign Service Act of 1946, as amended.

(e) Officers and employees of the United States Government may be detailed to offices or positions to which no compensation is attached with any foreign government or foreign government agency or with any international organization: *Provided*, That while so detailed any such person shall be considered, for the purpose of preserving his privileges, rights, seniority, or other benefits, an officer or employee of the United States Government and of the United States Government agency from which detailed and shall receive therefrom his regular compensation, which shall be reimbursed to such agency from funds available under this title: *Provided further*, That such acceptance of office shall in no case involve the taking of an oath of allegiance to another government.

(f) Experts and consultants or organizations thereof may be employed as authorized by section 15 of the Act of August 2, 1946 (5 U. S. C. 55a), and individuals so employed may be compensated at a rate not in excess of \$75 per diem.

(g) Such additional civilian personnel may be employed without regard to subsection (a) of section 14 of the Federal Employees Pay Act of 1946 (60 Stat. 219), as amended, as may be necessary to carry out the policies and purposes of this title.

SEC. 414. No citizen or resident of the United States, whether or not now in the employ of the Government, may be employed or assigned to duties by the Government under this Act until such individual has been investigated by the Federal Bureau of Investigation and a report thereon has been made to the Secretary of State: *Provided, however,* That any present employee of the Government, pending the report as to such employee by the Federal Bureau of Investigation, may be employed or assigned to duties under this Act for the period of three months from the date of its enactment. This section shall not apply in the case of any officer appointed by the President by and with the advice and consent of the Senate.

SEC. 415. The President shall transmit to the Congress an annual report of operations under this title.

SEC. 416. (a) In order to carry out the provisions of this title, there shall be made available such funds as are hereafter authorized and appropriated from time to time for the purposes of this title: *Provided, however,* That for the purpose of carrying out the provisions of this title through June 30, 1951, there is hereby authorized to be appropriated a sum not to exceed \$35,000,000, including any sums appropriated to carry on the activities of the Institute of Inter-American Affairs, and technical cooperation programs as defined in section 418 herein under the United States Information and Educational Exchange Act of 1948 (62 Stat. 6). Activities provided for under this title may be prosecuted under such appropriations or under authority granted in appropriation Acts to enter into contracts pending enactment of such appropriations. Unobligated balances of such appropriations for any fiscal year may, when so specified in the appropriation Act concerned, be carried over to any succeeding fiscal year or years. The President may allocate to any United States Government agency any part of any appropriation available for carrying out the purposes of this title. Such funds shall be available for obligation and expenditure for the purposes of this title in accordance with authority granted hereunder or under authority governing the activities of the Government agencies to which such funds are allocated.

(b) Nothing in this title is intended nor shall it be construed as an expressed or implied commitment to provide any specific assistance, whether of funds, commodities, or services, to any country or countries, or to any international organization.

SEC. 417. If any provision of this title or the application of any provision to any circumstances or persons shall be held invalid, the validity of the remainder of the title and the applicability of such provision to other circumstances or persons shall not be affected thereby.

SEC. 418. As used in this title—

(a) The term "technical cooperation programs" means programs for the international interchange of technical knowledge and skills designed to con-

tribute to the balanced and integrated development of the economic resources and productive capacities of economically underdeveloped areas. Such activities may include, but need not be limited to, economic, engineering, medical, educational, agricultural, fishery, mineral, and fiscal surveys, demonstration, training, and similar projects that serve the purpose of promoting the development of economic resources and productive capacities of underdeveloped areas. The term "technical cooperation programs" does not include such activities authorized by the United States Information and Educational Exchange Act of 1948 (62 Stat. 6) as are not primarily related to economic development nor activities undertaken now or hereafter pursuant to the International Aviation Facilities Act (62 Stat. 450), nor pursuant to the Philippine Rehabilitation Act of 1946 (60 Stat. 128), as amended, nor pursuant to the Foreign Assistance Act of 1948 (62 Stat. 137), as amended, nor activities undertaken now or hereafter in the administration of areas occupied by the United States armed forces or in Korea by the Economic Cooperation Administration.

(b) The term "United States Government agency, means any department, agency, board, wholly or partly owned corporation or instrumentality, commission, or independent establishment of the United States Government.

(c) The term "international organization" means any intergovernmental organization of which the United States is a member.

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THE DOCTRINE OF THE EQUALITY OF STATES AND ITS RECENT MODIFICATIONS

BY HERBERT WEINSCHIEL

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The doctrine of the equality of states has undergone gradual modifications, especially in more recent times—since the establishment of the League of Nations. (The great Powers have probably at all times dominated the political scene, particularly during the nineteenth century.) But since there existed no international organization, this predominance did not express itself in legal, but only in political terms, although it may at times have assumed a quasi-legal status, such as in regard to the law-making provisions of various treaties of the nineteenth century, sponsored mainly by the great Powers, which acquired the character of general international law. (It was only when international organizations were established, based on legal principles, that the dominant position of the great Powers received legal sanction.)

(It will be the task of this article to examine just in what fields and to what extent the doctrine of state equality has been modified and, on the other hand, in what respects it has retained its validity. (Of course, there are some writers who claim that the doctrine never possessed any validity—that equality never existed among states—or that it is an outworn doctrine or principle which has lost its meaning.)

To gain a better understanding of its more recent modifications, it will be necessary to give first a brief description of its origin, meaning, and important stages in its development.

I. THE DOCTRINE IN GENERAL AND ITS APPLICATION PRIOR TO THE LEAGUE COVENANT

(As long as the idea of the universal community remained alive, there was no room for the concept of the equality of states.) The Holy Roman Empire laid claim to the allegiance of all Christian rulers of Western Christendom. (The rise of national states and the Protestant Revolution undermined, and the Thirty Years' War destroyed, the idea of the universal community.) The notion of the community or family of states gradually took its place: The states were independent of the Empire and of each other. They were sovereign states: Equality was a result of sovereignty.) The equality of the German states—members of the Holy Roman Empire—was recognized

by the Treaty of Osnabrück¹—one of the three treaties that made up the Peace of Westphalia (1648). Equality for the Christian states *outside* the Empire had to be accepted by applying the *argumentum a minori ad majus*, if even the states *within* the Empire were recognized as equal.² (Actually, equality was recognized before the Peace of Westphalia.) The new national monarchies, such as France, England, Spain, Portugal, and Sweden, had not paid even lip-service to the Empire's claims long before the Thirty Years' War brought an official end to the universal community.³ (The doctrine of equality had to await elaboration by writers, especially by those of the naturalist school—led by Pufendorf—and by Vattel—who adopted their reasoning.) Their deduction was: Since men are by nature equal and have the same rights and obligations, states which are still in a "state of nature" must likewise be equal and hold from nature the same rights and obligations.) Even without the analogies from the human "state of nature," the theory would have arrived at the same results, because entities recognizing no superior authority above themselves must be considered as possessing an equal voice in all legal matters.⁵ (The doctrine of state equality developed from the time of the rise of the modern multi-state system; the Peace of Westphalia formed a landmark in its development,) and its elaboration is due to writers and to the strengthening of the state system. It seems that the older writers were agreed upon the meaning of the concept. (Of course, by state equality is meant *legal*, not *political*, equality, because the latter never existed.) It means equality before the law. (Legal equality of states was accepted in spite of physical inequality, just as among individuals *within* a state, where physical, mental, and financial inequality exists, but *all* are granted "the equal protection of the laws.")⁷

¹ "That there be an exact and reciprocal equality amongst all the Electors, Princes and States of both Religions . . ." (Art. V). Cf. Eagleton, *International Government* (rev. ed., 1948), pp. 5-6, and Oppenheim, *International Law*, Vol. I (7th ed. by Lauterpacht, 1948), p. 793, note 3. See also J. Goebel, Jr., *The Equality of States: A Study in the History of Law* (1923), p. 71.

² Cf. Eagleton, *op. cit.*, p. 5.

³ See Goebel, *op. cit.*, pp. 30-58, but especially pp. 43, 57-58. Differences in *rank* existed among the states and gave rise to many disputes over questions of precedence, but did not affect the equality of states. Cf. Oppenheim, *op. cit.*, pp. 248-249.

⁴ Vattel, *The Law of Nations* (translation by Fenwick, 1916), p. 7. Cf. Butler and Maccoby, *The Development of International Law* (1928), pp. 248-253. Chief Justice Marshall in *The Antelope* (10 Wheaton 66, 122 (1825)) and Sir William Scott in *Le Louis* (2 Dodson 210 (1817)) gave expression to the same idea.

⁵ See, however, Briery, *The Law of Nations* (4th ed., 1949), p. 47; Kelsen, *General Theory of Law and State* (1945), p. 387.

⁶ This view is most widely held, although not by Dickinson (*The Equality of States in International Law* (1920), p. 334). Cf. on the legacies of the Settlement of Westphalia, Leo Gross, "The Peace of Westphalia, 1648-1948," this JOURNAL, Vol. 42 (1948), pp. 20-41. See also Goebel, *op. cit.*, p. 86.

⁷ Cf. Fourteenth Amendment to the Constitution of the United States (Section 1).

(It is only more recently that there has been no agreement concerning the meaning of this concept.) Oppenheim's formulation seems to correspond to the true meaning of the traditional doctrine. According to ^{Oppenheim} him, legal equality has four consequences:

- (1) When a question arises which has to be settled by consent, every state has a right to a vote, but to one vote only.
- (2) The vote of the weakest and smallest state has as much weight as the vote of the largest and most powerful.
- (3) No state can claim jurisdiction over another.
- (4) The courts of one state do not, as a rule, question the validity of the official acts of another state insofar as those acts purport to take effect within the sphere of the latter state's jurisdiction.⁸)

However, Dickinson,⁹ confines equality to "the equal protection of the law or equality before the law," but denies "equal capacity for rights." Brierly¹⁰ takes a similar view. (Kelsen maintains that, as formulated by Oppenheim and most of the writers on international law,

x (the principle of equality is the principle of autonomy of the States as subjects of international law.¹¹ . . .

K. If the equality of the States means their autonomy, it is not an absolute and unlimitable, but a relative and limitable, autonomy which international law confers upon the States.¹²)

Lande claims that while the equality of states went into eclipse from the Congress of Vienna (1814-1815) to the Franco-Prussian War (1870-1871), it was *revindicated* in the period from 1871 to 1914.¹³

(It seems that the later writers who have attacked the traditional doctrine of equality have been more influenced by the actual practice of states, marked by the political hegemony of the great Powers, rather than guided by the legal principles embodied in this doctrine.) It is undeniable that this is the law or at least used to be the law—it is still today in most respects, although it may not always have been applied. Political hegemony had never been recognized as implying also legal hegemony in any legal instrument prior to the League Covenant and again in the United Nations Charter, although it may have functioned the same way in preceding centuries, especially in the nineteenth century—the era of the great law-

⁸ Cf. Oppenheim, *op. cit.*, pp. 238-242.

⁹ *Op. cit.*, pp. 334-335.

¹⁰ *Op. cit.*, p. 117.

¹¹ Kelsen, *op. cit.*, p. 253.

¹² *Ibid.*, p. 254. Kelsen on equality of states, *loc. cit.*, pp. 251-254, 387. In the same sense, Kelsen, "The Principle of Sovereign Equality of States as a Basis for International Organization," *Yale Law Journal*, Vol. 53 (1944), pp. 208-212, and "The Draft Declaration on Rights and Duties of States: Critical Remarks," this *JOURNAL*, Vol. 44 (1950), pp. 259-276, but especially pp. 268-269.

¹³ Lande, "Revindication of the Principle of Legal Equality of States, 1871-1914," *Political Science Quarterly*, Vol. 62 (1947), pp. 258-286, 398-417.

making treaties.¹⁴ The great Powers acted as self-appointed law-makers and the other states accepted the rules laid down by them.¹⁵ During the nineteenth century there were at first five great Powers, namely, Great Britain, Austria, France, Prussia, and Russia, and after 1871, six, with Italy added by her unification. These ~~five and later~~ six, great Powers, acting as a Concert, made decisions and laid down rules of international law which came to be accepted by practically all the other states. X

The rules established for the rank and precedence of diplomatic envoys, for free navigation on so-called international rivers, and the abolition of the negro slave trade—which all arose from the Congress of Vienna (1815)¹⁶—achieved world-wide acceptance. X The law-making provisions of the Treaty of Paris (March 30, 1856), especially the admission of the Ottoman Empire to the Christian state system, were respected by other states, non-signatories to the treaty; and the Declaration of Paris concerning Maritime Law (April 16, 1856), which was issued by the seven signatories to the Treaty of Paris, became *universal* international law through formal accession by most of the states of the world and through respect for its rules even on the part of those few states which, like the United States, never officially acceded to it. The perpetual neutralization of Switzerland by the Final Act of the Congress of Vienna (1815), the establishment and neutralization of Belgium by the Treaties of London of 1831 and 1839, and the neutralization of Luxembourg by the Treaty of London of 1867 (were also respected by the other states which were not parties to those treaties.) The same holds true for the decisions made by the six great Powers at the Congress of Berlin (1878) where three new independent states—Rumania, Serbia, and Montenegro—were created, and for the decisions and rules adopted at the Berlin Congo Conference (1885) concerning the partitioning of Africa. X

All this was achieved by the great Powers without the existence of a formal permanent international organization. Their influence was so dominant that it led international lawyers as Lawrence and Taylor to claim for the great Powers a position of *legal* superiority in relation to the smaller states—a “primacy” or “overlordship.”¹⁷ A recent writer,¹⁸ who made a study of this problem for the century before the first World War, reaches a similar conclusion concerning the period from the Congress of Vienna to the Franco-Prussian War (1814-1871), but not concerning the following

¹⁴ On this era, see Nussbaum, *A Concise History of the Law of Nations* (1947), pp. 191-199.

¹⁵ Cf. Jessup, *A Modern Law of Nations* (1948), p. 39.

¹⁶ The rules concerning diplomatic envoys were supplemented at the Congress of Aix-la-Chapelle (1818).

¹⁷ On this question, see Hicks, “The Equality of States and the Hague Conferences,” this JOURNAL, Vol. 2 (1908), pp. 547-549, where also the rejection of this view by Oppenheim (*International Law* (1905), Vol. I, pp. 162-164) is quoted.

¹⁸ Lande, *op. cit.*

period; the change being due to the decay of the "European Concert."¹⁹ *We may safely conclude that the great Powers, acting as the Concert of Europe and being only a *de facto* body during most of the century from the Congress of Vienna to the outbreak of the first World War made decisions and laid down rules of international law which were accepted, acquiesced in, or formally acceded to, by the other states.*

*The principle of legal equality was on the whole respected at the Hague Peace Conferences of 1899 and 1907, both in the formal organization of the conferences and in the method of voting.²⁰ *Scott, however, maintains:

It is abundantly clear . . . that the delegations at the Hague did not and could not possess equal influence in framing the conventions, and that, notwithstanding the principle of legal equality, the larger States either forced their views upon the Conference or by their opposition prevented an unacceptable proposition from being accepted.²¹

But it is to be remembered that it was the larger states which at the Second Hague Conference of 1907 favored an important project—the establishment of a permanent international tribunal, the Court of Arbitral Justice—and that it was the smaller states which, by their insistence upon permanent and equal representation on the bench of that court, brought the whole project to grief at that time.²²

(Already prior to the establishment of the League of Nations, unequal representation and the majority principle were recognized in various international public unions, but here members usually had the choice of securing greater representation and hence additional votes by paying higher contributions, and furthermore these organizations were concerned with technical matters where only the lesser and no *vital* interests of states were involved—unlike the situation in the League of Nations.²³ (In this connection it may be appropriate to examine the question whether the majority principle and unequal representation are reconcilable with the doctrine of equality. In regard to this problem, Kelsen²⁴ says that

it is a misuse of the concept of equality to maintain that it is incompatible with the equality of the States to establish an agency endowed with the competence to bind by a majority vote States represented, or

¹⁹ *Ibid.*, pp. 259, 286.

²⁰ Cf. Hicks, *op. cit.*, p. 530. On the rule of "quasi-unanimity," applied there, see Eagleton, *op. cit.*, pp. 195-196; Fenwick, *International Law* (3rd ed., 1948), p. 224.

²¹ J. B. Scott, *The Hague Peace Conferences of 1899 and 1907* (1909), Vol. I, p. 165.

²² The idea was, of course, revived thirteen years later by the establishment of the Permanent Court of International Justice, but not until after the holocaust of the first World War. On the projected court, see Hudson, *International Tribunals: Past and Future* (1944), pp. 8, 25; Jessup, *op. cit.*, p. 29; Lande, *op. cit.*, p. 405.

²³ For details, see Sohn, "Multiple Representation in International Assemblies," *this JOURNAL*, Vol. 40 (1946), pp. 71-99.

²⁴ *General Theory of Law and State*, p. 254; cf. also p. 253.

not represented, in the law making body. The equality of the States does not exclude the majority vote principle from the realm of international law.

If read in connection with a discussion by Kelsen of this problem on another occasion,²⁵ this is meant to say that under existing international law (*de lege lata*) a true international legislature could function, in which states would be represented or not represented, and could pass laws by majority vote, binding upon *all* states, provided only that such a legislature were established by a treaty of all states and endowed with such powers.²⁶ While there would not be the slightest objection to such a statement, if made as a proposal *de lege ferenda*—provided, of course, that some form of proportionate representation of the various states in such a legislature would have to be devised (which Kelsen, however, does not indicate in his statement)—it certainly does not comport with the existing law. This is also made clear by Oppenheim when he says:

International Law as at present constituted knows of no legislative process in the proper sense of the word, i.e. the imposition of legally binding rules upon a dissenting State or minority of States.²⁷

But Kelsen himself admits that "submission to legislative organs, but not to courts, is considered incompatible with the principle of sovereign equality."²⁸

Lande, on the other hand, maintains:

Such developments as weighted voting, unequal representation, and so on, are reconcilable with the principle of equality, as conceived above, unless they serve to establish the domination of one country by another.²⁹

However, Lande does not clearly indicate the sphere where weighted voting and unequal representation might or might not be reconcilable with the principle of equality.

We may conclude with the following general statement: Under existing international law the majority principle and unequal representation are compatible with the doctrine of state equality only in purely technical and procedural matters where only the lesser interests of states are involved, but are incompatible with that doctrine in substantive, and especially legislative, matters where the more important or vital interests of states are involved.

²⁵ Kelsen, *loc. cit.*, Yale Law Journal, Vol. 53 (1944), pp. 209-212.

²⁶ See *ibid.*, p. 210.

²⁷ Oppenheim, *International Law*, Vol. I (7th ed.), pp. 238-239.

²⁸ *Loc. cit.*, Yale Law Journal, Vol. 53 (1944), p. 219.

²⁹ Lande, *op. cit.*, p. 417. See also *ibid.*, pp. 412-413.

II. THE DOCTRINE AND THE LEAGUE COVENANT

It was only in the Covenant of the League of Nations that the political hegemony of the great Powers was for the first time given legal recognition in a document and thereby transformed into legal hegemony, or, in other words, legal equality was changed to legal inequality in a limited sphere. Just as political inequality had always been recognized as an undeniable fact, so now legal inequality came also to be accepted as a result of the actual distribution of power among the states. We find the same phenomenon in the Charter of the United Nations, only on a greatly extended scale. The difference between the situation under the League and that under the United Nations is this: While under the League the states which were legally treated as great Powers by giving them permanent seats on the Council were also actually great Powers; under the United Nations, on the other hand, some of the states which are legally accorded great Power status by receiving permanent membership in the Security Council, with the privileged position which this entails, are actually not great Powers: One of them—China—never was considered a great Power, and two others—France and Great Britain—lost this status as a result of the second World War, although some maintain that Great Britain, because of her world-wide Empire and interests, might still be counted among the great Powers. Thus the United Nations Charter has brought about a unique reversal of the realities of international politics.

Prior to the first World War there were six (nineteenth century) or eight states (early twentieth century) which were recognized as great Powers because of their *political* hegemony, without giving them a privileged position under law as against the other members of the international community, i.e., without recognizing their hegemony as *legal*. But under the United Nations Charter, of the five permanent members of the Security Council at least two, but possibly three, are recognized as possessing *legal* hegemony without holding political hegemony. As far as these two or three states are concerned, the modification of the doctrine of state equality, which discriminates against the lesser states, does not even conform to the actual power situation; while it did conform under the League where, although the five Principal Allied and Associated Powers were named in the Covenant as permanent members of the Council (Article 4 (1)), the Council, with the approval of the Assembly, had the right to create additional permanent seats (Article 4 (2)) and, hence, the number of the permanent members was not definitely fixed in the Covenant.³⁰ In the United Nations, on the contrary, all permanent members of the Security Council are named in the Charter

³⁰ Brazil left the League because she was refused a permanent seat on the Council when Germany as a great Power was granted such a seat on the occasion of her admission as a Member of the League (1926). This shows that the actual status of a state was taken as the basis of eligibility for permanent membership on the Council.

and their number fixed at five (Article 23 (1)) and a change would only be possible by amendment of the Charter (Article 108), *i.e.*, not against their will.

Among the four consequences of state equality, as stated by Oppenheim,³¹ the two most important undoubtedly are: (1) equality of representation, namely, that every state has *one* vote and, as a rule, no more than *one* vote in international conferences; and (2) equality of voting power, namely, that every vote has *equal* weight, so that a state will not be bound without its own consent. How did the League Covenant live up to these postulates and in what respects was the doctrine of equality modified by it? In the League there existed equality of representation and, with certain exceptions, also of voting power in one of its two main organs—the Assembly, where all Members of the League were represented by not more than three delegates, but each Member possessed only *one* vote (Article 3 (1), (4)).³²

The exceptions from equality of voting power in the Assembly were two: (1) A report, made by the Assembly concerning a dispute submitted to it for settlement (Article 15 (9)), required, in addition to "a majority of the other Members of the League," the concurrence of the members of the Council, not counting the parties to the dispute (Article 15 (10)); (2) Amendments to the Covenant required for their validity the ratification not only "by a majority of the Members of the League," who were all represented in the Assembly, but also by the members of the Council (Article 26 (1)). Apart from these exceptions, the principle of equality of voting power was preserved in the Assembly. The general rule was that decisions of the Assembly and of the Council required *unanimity* "of all the Members of the League present at the meeting" (Article 5 (1)). The requirement of unanimity expresses equality.³³ In certain specified cases, decisions of the Assembly and of the Council could be made by majority vote; in the Assembly sometimes a special two-thirds majority was required. But such majority decisions did not detract from the principle of equality.

The Assembly exercised independently, or shared with the Council, *elective* functions by majority vote; The Assembly admitted new Members to the League (Article 1 (2)), fixed the rules for the election of, and elected, the non-permanent Members of the Council—all this by a two-thirds majority (Article 4 (2 bis)); it shared with the Council in the election of the judges of the Permanent Court of International Justice, for which an absolute majority of votes in both organs was required;³⁴ and it gave its approval by majority vote to the appointment by the Council of the Secre-

³¹ International Law, Vol. I, pp. 238-242.

³² In every international conference or organization there is normally one body in which all states participating are represented.

³³ Cf. Kelsen, *loc. cit.*, Yale Law Journal, Vol. 53 (1944), p. 212. See also McNair, "Equality in International Law," Michigan Law Review, Vol. 26 (1927), pp. 147-148.

³⁴ Statute of the Permanent Court of International Justice, Arts. 4 (1), 8, 10 (1).

tary General (Covenant, Article 6 (2)). (A majority vote was also sufficient in both Assembly and Council on "all matters of procedure" (Article 5 (2)). But decisions on all other, *i.e.*, *important*, matters required *unanimity*.)

In contrast to the Assembly, in the Council of the League there did not exist equality of representation. The Council had permanent and non-permanent members. Only great Powers were permanent members—originally Great Britain, France, Italy, Japan, and the United States (although the latter never took her seat since she did not become a Member of the League), later Germany (1926) and the Soviet Union (1934). The distinction between permanent and non-permanent Council members marks the first important step in the *modification* of the traditional doctrine of the equality of states, by giving legal recognition to the political hegemony of the great Powers. Only they—less than half a dozen states at any one time—were accorded permanent representation on what was intended to become the more important, although the smaller and, hence, supposedly the more efficient of the two main organs of the League; while the other Members of the League—normally well over two score—could only hold temporary membership, provided they were elected to the Council for three-year terms.³⁵

Yet, while there was no equality of representation on the Council, there was still equality of voting power for all members of the Council. *i.e.*, also for the lesser Powers, once they had secured a seat on the Council. Because all decisions of the Council on important matters required a unanimous vote, that is, *every* member of the Council, whether permanent or non-permanent, had a veto power. The only limitation was that the votes of the parties to a dispute were not counted under Article 15, while they were counted under Article 11, under which article more disputes were submitted to the League than under other articles.³⁶

On the basis of the situation as found under the League, it might be concluded that the great Powers were given a privileged position by granting them permanent representation on the Council and that all other Members of the League were discriminated against by denying them permanent seats. This is no doubt *prima facie* a violation of the principle of state equality. This was done in practical realization of the greater power, and hence greater responsibility for the fulfillment of the purposes of the League, on the part of the leading members of the organized community of states. But upon closer examination, the violation of the equality principle does not appear so serious. Apart from the fact that there were permanent and non-permanent members of the Council and that, conse-

³⁵ There were at various times four, six, nine, or eleven non-permanent members. Cf. Eagleton, *International Government*, p. 276.

³⁶ Cf. Eagleton, *ibid.*, pp. 277, 412.

quently, most League Members had no part in the Council's decisions, these decisions were legally only "recommendations" which were not binding upon the League Members. Even a unanimous report under Article 15 (6) of the Covenant had only the nature of a recommendation by the Council suggesting terms of settlement, and did not have to be accepted by the disputants.³⁷

It is true that the Members of the League were bound to apply economic sanctions automatically even without waiting for action by the Council—at least as it was originally intended—if Article 16 of the Covenant had been violated by a Member or non-Member of the League.³⁸ But here again, every Member of the League was left free to decide for itself whether or not such a violation of the Covenant had taken place, and, if it came to the conclusion that the Covenant had not been violated, it did not have to participate in economic sanctions, although in the abstract it was legally bound to apply them.³⁹ (Yet, while a League Member was bound, in the abstract, to apply *economic* sanctions, it was not even bound, in the abstract, to apply *military* sanctions.) Measures of this kind the Council could only "recommend" to the Members (Article 16 (2)) and, hence, there did not exist a legal obligation on their part to execute them.) In all its other functions, too, the Council was limited to recommendations.⁴⁰ (However, the Council possessed a real power which violated the principle of equality because the other Members of the League, not represented on the Council, were excluded from its exercise: This was the right of the Council to expel by unanimous vote a "Member of the League which has violated any covenant of the League" (Article 16 (4)).⁴¹)

On the basis of this examination of the legal situation under the League Covenant, we can say in conclusion: While there was no equality of representation in the Council, yet the legal equality of the Members of the League was really not impaired,⁴² because they were not bound by decisions in which they did not participate or, in other words, were not bound without their own consent—which is the cardinal principle in the equality of

³⁷ Cf. Brierly, *Law of Nations*, p. 274; Eagleton, *op. cit.*, p. 414.

A report made by the Assembly which was adopted by a majority of the other Members of the League and concurred in by the members of the Council, not counting the parties to the dispute, had the same effect as a unanimous report by the Council (Covenant, Art. 15 (10)).

³⁸ The phraseology of Art. 16 (1): "... which thereby undertake immediately . . .," expresses a *mandatory* provision, enjoining automatic action.

³⁹ Cf. Eagleton, *op. cit.*, pp. 416-417; Brierly, *op. cit.*, pp. 275-276.

⁴⁰ For example, formulation of plans for the reduction of armaments "for the consideration and action of the several Governments" (Covenant, Art. 8).

⁴¹ But this power was used only once when the Soviet Union on Dec. 14, 1939, was expelled from the League for her unprovoked attack upon Finland. Cf. Eagleton, *op. cit.*, p. 263.

⁴² Except perhaps for the power of the Council to expel a Member of the League.

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states. This principle was observed even in the case of amendment of the Covenant, although, in order to become effective, its ratification by only majority of the Members of the League, but including the Members of the Council, was required (Article 26 (1)). A Member of the League which refused to accept an amendment was not bound by it. The only consequence was that it automatically ceased to be a Member (Article 26 (2)). The equality of the Members was, of course, also respected in the right of each Member, expressly recognized in the Covenant—the League being a voluntary organization—to *withdraw* from the League after two years notice (Article 1 (3)).

VIII. THE DOCTRINE AND THE UNITED NATIONS CHARTER

A more far-reaching and more real modification of the doctrine of state equality than in the Covenant of the League of Nations is encountered in the Charter of the United Nations. Yet the latter proclaims "the sovereign equality of all its Members" (Article 2 (1)) as the first fundamental principle upon which the Organization is based—this in accordance with its Preamble where "the equal rights of nations large and small" are reaffirmed. On this principle of equality the League Covenant was "discreetly silent,"⁴³ but there it was truer. By the term "sovereign equality"⁴⁴ the Charter seeks to express that it recognizes the sovereignty and equality⁴⁵ of all its Members and thereby to allay any doubts or fears that the United Nations possesses any superior authority over its Members; in other words, it states at the beginning of the document that the United Nations is not a super-state.⁴⁶

It must be admitted that the "sovereign equality" of all the Members of the United Nations is respected in most instances. At the same time it is also clear that, notwithstanding the assurance given to all Members in Article 2 (1), their equality has been subjected to considerable modification in a few respects, but especially in one field which is also the most important of all, namely, international peace and security, the maintenance of which forms the main purpose of the Organization.⁴⁷ Here *equality* has been

⁴³ Cf. Potter, *An Introduction to the Study of International Organization* (5th ed., 1948), p. 260.

⁴⁴ This term was first used in the Moscow Four-Power Declaration on General Security of Oct. 30, 1943, and adopted from there. For text of this Declaration, see Department of State Bulletin, Vol. IX (1943), pp. 308-309; this JOURNAL, Supp., Vol. 38 (1944), p. 5. Cf. also Kelsen, *loc. cit.*, Yale Law Journal, Vol. 53 (1944), pp. 297-220.

⁴⁵ Cf. Kelsen. *ibid.*, p. 207.

transformed into *inequality* for all Members of the United Nations. The five permanent members of the Security Council, named in Article 23 (1)), which alone have retained their full equality.

In order to understand clearly in what sphere and to what extent the principle of state equality has been compromised in the Charter in favor of the five great Powers and, on the other hand, in what respects it has been preserved as a legal doctrine, it will be necessary to examine the position of the Member States in the various organs of the United Nations in connection with the powers, functions, and voting procedures of these organs. At the beginning of this examination we should mention that unanimity has been abandoned in *all* organs of the United Nations, while it was still the rule in the Assembly and Council of the League of Nations.⁴⁸ In other words, all organs of the United Nations make their decisions by majority vote, although, under certain circumstances, a qualified majority may be required. Since unanimity is a concomitant of state equality, the abandonment of this requirement and its replacement by an—however qualified—majority would *prima facie* indicate an impairment of state equality in all organs of the United Nations.

In order to answer the question whether the equality of the Members is impaired by majority vote, we shall have to analyze and evaluate the powers and functions of the various organs of the United Nations with a view to finding out whether the Member States are bound by the decisions of these organs reached by majority vote; and only in those cases where such decisions are made with binding effect upon the Members will the conclusion be warranted that the latter have yielded some of their sovereignty to the Organization.⁴⁹

1. THE PROBLEM OF REPRESENTATION

In discussion the legal position of the Members under the League of Nations we have found that there existed equality of representation in the Assembly, but not in the Council and, on the other hand, equality of voting power in both organs—once the non-permanent members had been elected to the Council—because unanimity was mandatory in both on important matters. What changes have been made in this respect in the United Nations? It has been stated already that unanimity has been abolished in *all* its organs. But there were also other changes. (In regard to *representation*, the situation has remained about the same, except that the United Nations has six, instead of three, principal organs, as the League had, and the World Court (International Court of Justice) is now one of the organs

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of the United Nations (Charter, Articles 7, 92), while the Permanent Court of International Justice) was not integral.

Looking over the individual organs, we find that, just as in the League, so also in the General Assembly of the United Nations, the Members of the Organization—at present sixty—are elected for three-year terms (Article 9). Equality of representation can also be found in the Economic and Social Council, to which eighteen Members are elected by the General Assembly for three-year terms (Article 18). As to re-eligibility and no provisions for permanent Members, i.e., no discrimination between great Powers and small Powers, although the possibility of unlimited re-election assures the great Powers of permanent membership. The Charter of the United Nations is not discriminatory, as it is in regard to the Security Council, where the Charter (Article 23) provides for permanent and non-permanent members, the latter elected for two years and not immediately re-eligible. The Secretariat, the principal organs (Article 7), is really an international organization as such independent of instructions by Member States; its recruitment should be made "on as wide a geographical basis as possible" (Article 101 (3)). But being "responsible only to the Assembly" (Article 100 (1)), these officials are not representatives of the States in which they are nationals and, hence, the Secretariat is not included in the present analysis as to what extent equality of representation exists in the principal organs of the United Nations.

While it has been seen that such equality of representation exists in the General Assembly and the Economic and Social Council, there is definitely no equality of representation in two other principal organs, the Security Council and the Trusteeship Council. The Security Council consists of eleven members of which only five—the great Powers of the Charter—are permanent members. Six other States are elected by the General Assembly as non-permanent members from among the Members of the United Nations—at present fifty-five. The requirement is that, in electing them, "due regard shall be given to equitable geographical distribution" (Article 23). The Trusteeship Council is based partly on interest representation; half of its members is made up of states holding trust territories (Trustee Powers), which are, of course, permanent members, i.e., as long as they administer trust territories. This representation is balanced by granting membership in regard to states which are not Trustee Powers and, hence, by giving them representation in the administration of such territories. Here again, as in the Security Council, a distinction is made between permanent members of the one half by according them permanent seats to the great Powers which are not also Trustee Powers.

and the Soviet Union--and making the others elective for three-year terms by the General Assembly, with the possibility of re-election. Since there are at present six Trustee Powers, namely, Great Britain, France, Belgium, Australia, New Zealand, and the United States, the Trusteeship Council, in accordance with Article 86, consists of twelve members, of which two—China and the Soviet Union—enjoy a privileged position by holding permanent membership, while there are only four elective, non-permanent members, chosen by the General Assembly from among the remaining Members of the United Nations, at present fifty-two.⁵⁰

Finally, it remains to be examined whether the present International Court of Justice or, for that matter, its predecessor, the Permanent Court of International Justice, enters into our problem of equality of representation. The limited membership of the World Court—fifteen judges—alone would be no indication whether or not such equality exists. Of course, equality of representation is preserved in the General Assembly since all Members of the United Nations are represented in that organ. This is obvious. But we found that such equality is also maintained in the Economic and Social Council, although this organ consists only of eighteen members, elected for three-year terms with no limitations on re-election,⁵¹ just as the World Court consists of fifteen judges elected for nine-year terms with no restrictions as to re-election.⁵²

Yet the problem is not the same in the two cases, although at first sight they appear to be alike. The eighteen members of the Economic and Social Council are really *states*, i.e., Members of the United Nations, each represented on the Council by one instructed delegate (Article 61). (The members of the Bench forming the World Court, however, were always, and are now, *individuals* who do not represent the states of which they are nationals.⁵³ Hence, they are not instructed delegates, but independent judges. They may be chosen from among citizens of states which are not Members of the United Nations, just as judges of the Permanent Court of International Justice also were chosen from among citizens of states which were

⁵⁰ What could be considered the forerunner of the Trusteeship Council, namely, the Permanent Mandates Commission set up by the League of Nations under Art. 22 (9) of the Covenant, cannot be regarded as having violated the principle of equality of representation, as is the case with the Trusteeship Council, first because the Mandates Commission was not a body representing governments, as the Trusteeship Council is, consisted of eleven experts, appointed by the Council of the League, who as instructed members of that Commission, with the further limitation that the members should be nationals of states which were not Mandatories. mission functioned only as *adviser* to the Council of the League with the supervision of the Mandates System. See Covenant, Art. 22, International Law, Vol. I, pp. 194-195, 213-214.

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International Court of Justice, Arts. 3 (1), 13 (1).

of whom may be nationals of the same state" (*ibid.*, Art. 3 (1)).

not Members of the League of Nations.⁵⁴ (Therefore, the problem of equality of representation does not enter into the composition of the World Court, although it can be stated that great Powers are practically always "represented" on the Bench of this Court,⁵⁵ in the sense that a national of every great Power is a judge of this Court.)

The fact that the judges of the World Court are elected by the Members of the United Nations in the General Assembly and Security Council, as they were elected by the Members of the League of Nations in the corresponding organs of that organization (Assembly and Council), does not detract from their independence, when considering our preceding deduction. The election by these political organs composed of state representatives can only be construed as giving the judges a *collective mandate* of the organized community of states to decide international disputes submitted to them by states, "in accordance with international law."⁵⁶ Once elected, the judges of the World Court have the same independent position as judges elected or appointed to municipal courts. It must be admitted, however, that the idea that judges are somehow representatives of their states has survived in the institution of the "national judge" which entitles every state to have a judge of its nationality upon the Bench in a dispute to which it is a party.⁵⁷ This is one of the results of the doctrine of state equality.

2. THE PROBLEM OF VOTING POWER

It has been shown that the five great Powers possess a privileged position in both the Security Council and the Trusteeship Council as against the other Members of the United Nations by virtue of their permanent membership in these two organs as granted to them expressly in the Charter (Articles 23, 86) and, hence, that in these two Councils there does not exist equality of representation. It has also been seen earlier that the requirement of unanimity has been eliminated in all organs of the United Nations and that all decisions are made by majority vote, however qualified that majority might be in certain cases. At first glance, this might indicate that there is no equality of voting power in the organs of the United

⁵⁴ During the functioning of the Permanent Court there was always a citizen of the United States (which did not join the League or the World Court) as judge on the Bench of that Court: John Bassett Moore (1922-1928), Charles Evans Hughes (1928-1930), Frank B. Kellogg (1930-1935), Manley O. Hudson (1936-1945).

On this question, see also M. O. Hudson, *International Tribunals*, p. 25. Cf. Statute, Art. 2.

⁵⁵ This is especially true of the present International Court of Justice. For a recent list of the judges of this Court, see *International Organization*, Vol. 4 (1950), p. 58.

⁵⁶ See Statute, Art. 38.

⁵⁷ *Ibid.*, Art. 31. For a critical view of this institution, see Lauterpacht, *The Function of Law in the International Community* (1933), pp. 228-235. See also Brierly, *Law of Nations*, p. 257.

Nations, since its Members could be bound by decisions adopted by a majority, to which they had not given their consent, and that this would constitute a violation of the principle of state equality. But a more careful analysis would suggest that such a violation or modification of the traditional doctrine could only be assumed if such majority decisions were to impose new obligations upon the Members of the United Nations without their consent and to the extent to which they would do so. On the other hand, if these "decisions" were only to have the character of *recommendations* without binding effect upon the Members, this would not entail a violation or modification of the doctrine of equality. In order to establish with definiteness whether or not such a violation or modification of the traditional equality has taken place in the United Nations, and, if it has, in what field and to what extent, it is necessary to examine the powers and functions of the organs of the United Nations and to evaluate the character of their respective decisions—a task to which we now turn.

In general, it can be said that of the six principal organs of the United Nations only two—the Security Council and the International Court of Justice—have the power to make decisions *binding* upon Members of the Organization. While the Security Council's decisions are binding upon *all* Members,⁵⁸ the Court's decisions are binding only upon the parties to the dispute, whether Members or non-Members.⁵⁹ The powers of three other principal organs are mainly⁶⁰ or solely⁶¹ limited to recommendations; in other words, these organs, except perhaps for certain elective and financial powers of the General Assembly, have no powers, because they cannot make binding decisions.

a. The General Assembly

Turning first to the General Assembly, we find that this organ adopts its decisions obviously those concerning procedural matters, by a simple majority (Article 18 (3)), but those on important questions by a two-thirds majority (Article 18 (2)), in both instances "of the members present and voting." Only the adoption of amendments to the Charter requires a two-thirds majority of all the Members of the General Assembly (Article 108). The only real powers of the General Assembly transcending mere recommendations, are *elective* functions—suspension and expulsion of Members could be included here as the reverse of election—and *financial* functions. While the latter functions are exercised independently by the General Assembly, of those classified here as elective functions only three are exercised independently, but the others only either concurrently with, or

⁵⁸ Charter, Art. 25.

⁵⁹ Statute, Art. 59.

⁶⁰ Those of the General Assembly.

⁶¹ Those of the Economic and Social Council and of the Trusteeship Council. The Secretariat, also a principal organ, has only administrative functions.

upon the recommendation of, the Security Council. Decisions on all these matters are made by the General Assembly by a two-thirds majority⁶² and have to be accepted by all Members of the United Nations.

The General Assembly adopts the budget for the whole Organization and apportions the expenses of the Organization among the Members (Article 17 (1), (2)). However, this *financial* power of the General Assembly is limited only to the principal and subsidiary organs of the United Nations and does not extend to the specialized agencies under Article 57, since the General Assembly can only make recommendations to them in regard to their administrative budgets after examining them for that purpose (Article 17 (3)).

The *elective* functions of the General Assembly are threefold: those exercised (a) independently of, (b) concurrently with, and (c) upon recommendation of, the Security Council. The following are exercised independently: the election of the six non-permanent members of the Security Council, the election of the eighteen members of the Economic and Social Council, and the election of the elective members of the Trusteeship Council (Article 18 (2)). The General Assembly also takes part with the Security Council in the election of the fifteen judges of the International Court, an absolute majority in both bodies being required for election (Statute, Articles 4, 8, 10). All other elective functions can only be exercised by the General Assembly upon the recommendation of the Security Council. They include the admission of new Members to the United Nations, the suspension of the rights and privileges of membership,⁶³ the expulsion of Members (Article 18 (2); Articles 4-6), and the appointment of the Secretary General of the United Nations (Article 97).

The financial and elective powers of the General Assembly, discussed above, may be classified as *organizational* powers, but they are not really substantive powers, dealing with the main purposes of the United Nations. Outside of these organizational powers, the General Assembly does not possess the authority to make binding decisions, *i.e.*, on *substantive* matters. On such matters it can only make *recommendations* to the Members of the United Nations which might carry great weight, but which the Members remain free to accept or to reject. The General Assembly has broad "powers" of discussion and, as "the town meeting of the world,"⁶⁴ may deal with any phase or aspect of international relations.⁶⁵ Here its main function is to arouse and mobilize world public opinion. It may especially initiate studies and make recommendations for the promotion of interna-

⁶² Except participation in the election of the judges of the International Court, which requires only an absolute majority (Statute, Art. 10 (1)).

⁶³ The Security Council can restore them (Art. 5).

⁶⁴ See Goodrich and Hambro, *Charter of the United Nations: Commentary and Documents* (2nd ed., 1949), p. 83.

⁶⁵ *Cf.* Charter, Art. 10.

ional co-operation in the political, economic, social, and legal fields (Article 3), and may also make recommendations in regard to the maintenance of international peace and security; but when *action* is necessary it has to refer the matter to the Security Council (Article 11), the only organ of the United Nations charged with enforcement action in case of a disturbance of the peace (Article 24).⁶⁶

The preceding examination of the powers and functions of the General Assembly permits the following conclusion: Since the General Assembly has no authority to bind by its majority decisions the Members of the United Nations in substantive matters without their consent or, in other words, since it does not possess true legislative powers like a municipal legislature, it cannot be claimed that the traditional equality of states has been modified by the admission of the majority vote principle in that organ.⁶⁷

4. *The Economic and Social Council and the Trusteeship Council*

The foregoing conclusion is even truer for the Economic and Social Council and the Trusteeship Council, because, though described as "principal" organs (Article 7 (1)), they really function under the authority of the General Assembly,⁶⁸ and whatever decisions they make must be approved by the General Assembly.⁶⁹ Hence, these two Councils have even less independent "powers" than their parent body. The Economic and Social Council has been aptly described as "a kind of standing committee of the General Assembly"⁷⁰ and the same could be said in regard to the Trusteeship Council,⁷¹ the only difference being that the idea of interest representation has been applied to half of its membership. That a simple majority is sufficient, and in no case is a special majority required, for decisions of the Economic and Social Council (Article 67) and Trusteeship Council (Article 69)—which means that these two organs have moved even farther away from unanimity than the General Assembly⁷²—has no bearing on the doctrine of equality when the *dependent* position and the *limited* powers of these organs are considered.)

The Economic and Social Council has the right to make or initiate studies and reports, to prepare draft conventions, to call international conferences, within its very broad sphere of action (Article 62), and to conclude agreements with specialized agencies by which they are brought into relationship

⁶⁶ Cf. Goodrich and Hambro, *op. cit.*, p. 169.

⁶⁷ The procedure for amending the Charter, in which the General Assembly participates and which might be interesting in regard to the problem of state equality, will be taken up later.

⁶⁸ See Arts. 60, 85, 87.

⁶⁹ See, for instance, Arts. 63, 87.

⁷⁰ Goodrich and Hambro, *op. cit.*, p. 366.

⁷¹ See Art. 85 (2).

⁷² See Arts. 12, 108.

with the United Nations (Articles 57, 63), and can perform various additional functions (Articles 64-66). However, in carrying out its multifarious tasks, it acts, as already stated, under the authority of the General Assembly, and, except for the agreements made with the specialized agencies which after their approval by the General Assembly (Article 63 (1)) become binding upon both parties (the United Nations and the agencies), the Economic and Social Council in all its other functions is limited to *recommendations* only and has, like the General Assembly in all but its organizational functions, no power to make binding decisions.⁷³

The main purpose of the Trusteeship Council is to assist the General Assembly in carrying out its functions in connection with the supervision of the administration of ordinary, *i.e.*, *non-strategic*, trust territories by the Trustee Powers.⁷⁴ It has to examine trusteeship agreements, to be concluded with the Trustees, formulate and send out questionnaires to them which serve as the basis for their annual report on their administration and on the progress made towards fulfilling the basic objectives of the trusteeship system, as laid down in Article 76, examine these reports and also petitions from the inhabitants of these territories, and arrange for periodic visits to these areas (Articles 85, 87-88). But in the performance of all these functions the Trusteeship Council acts only as the *auxiliary* organ of the General Assembly, relieving it thereby of a great amount of detailed work, which remains, however, subject to its examination and approval. As can be gathered clearly from the wording of Articles 16, 85, and 87, the General Assembly, not the Trusteeship Council, is here *dominus litis*. Hence, the decisions made by the Trusteeship Council by simple majority vote (Article 89 (2)) can be considered as having only the character of preliminary recommendations, to be passed upon by the General Assembly, the powers of which we have analyzed and evaluated before.

In our analysis of the powers and functions of the principal organs of the United Nations it will not be necessary to dwell at any length upon the Secretariat, just as it was not necessary to consider this organ under the aspect of equality of representation, because its functions as an international civil service are almost entirely administrative and advisory and hence it does not come into the position of making decisions under its own authority. It has to serve the whole Organization ~~as well as~~ as its individual organs (Article 101).

The last two organs to be considered in greater detail are the Security Council and the International Court of Justice. Both have the power to

⁷³ The "powers" of the specialized agencies are about on the same plane as those of the Economic and Social Council, only in a more limited field. On this point, see Eagleton, *International Government*, p. 383.

⁷⁴ *Strategic* trust areas come under the supervision of the Security Council, (Art. 83 (1)). However, the latter may also "avail itself of the assistance of the Trusteeship Council" (Art. 83 (3)).

make binding decisions, although, in the case of the Security Council, not in all spheres of its competence.

c. *The Security Council*

(The Security Council has been entrusted with the primary responsibility for maintaining international peace and security (Article 24 (1)). In this capacity it has the duty to promote the pacific settlement of disputes (Chapter VI) and has the power to take economic⁷⁵ and military⁷⁶ enforcement measures whenever necessary in order to prevent or stop aggression (Chapter VII). But in regard to the settlement of disputes the Security Council can only make *recommendations* to the disputing parties, i.e., it "may . . . recommend appropriate procedures or methods of adjustment" (Article 36 (1)), or "recommend . . . terms of settlement" (Article 37 (2)), or "make recommendations to the parties with a view to a pacific settlement of the dispute" (Article 38). The parties are not bound to accept the recommendations of the Security Council,⁷⁷ as long as they refrain from the use of force inconsistent with the Purposes of the United Nations, an obligation which they have assumed under Article 2 (4) of the Charter.)

(It is only in the field of enforcement action under Chapter VII that the Security Council has been empowered to make decisions binding upon the Members of the United Nations.) While Chapter VI, as has been seen above, gives the Security Council only the right to "*recommend*," Chapter VII gives that organ also the power to "*decide*" upon measures to be taken to maintain or restore international peace and security.⁷⁸ Unlike the situation under the League Covenant, where every Member was left free to decide for itself whether a violation of the Covenant had been committed, as a condition for the application of sanctions, the Security Council alone, and not the individual Members of the United Nations, determines with finality "the existence of any threat to the peace, breach of the peace, or act of aggression" and decides what measures shall be taken to meet this challenge.

(The Members of the United Nations are bound to accept the decisions of the Security Council and to carry them out (Articles 25, 48) by rendering all necessary assistance, including armed forces (Article 43).⁷⁹) The obligation of Article 25 refers only to enforcement measures under Chapter VII and not to the functions of the Security Council under Chapter VI, because,

⁷⁵ Art. 41.

⁷⁶ Art. 42.

⁷⁷ Cf. Goodrich and Hambro, *op. cit.*, pp. 255, 260.

⁷⁸ See Arts. 39, 41, 42.

⁷⁹ Cf. Eagleton, "Covenant of the League of Nations and Charter of the United Nations: Points of Difference," Department of State Bulletin, Vol. XIII (Aug. 19, 1945), pp. 263-269, especially p. 265.

Up to now the special agreements, called for in Article 43, which were to implement the military enforcement measures of the Security Council, have not been concluded.

as shown above, only in regard to enforcement action can this organ make *decisions* in a technical sense, notwithstanding that the Charter (Article 27 (3)) speaks of "decisions under Chapter VI, and under paragraph 3 of Article 52," which clearly can only mean "recommendations."⁸⁰

The obligation to carry out the decisions of the Security Council rests, of course, upon all Members of the United Nations,⁸¹ provided that the Security Council has been able to reach such a decision. This brings us to the voting provisions of the Charter in regard to the Security Council. As the other organs of the United Nations, the Security Council, too, decides all matters by majority vote, but here a system of qualified majority voting is used: The Charter requires "an affirmative vote of seven members" which in *procedural* matters means *any* seven members (Article 27 (2)). However, decisions on all other, *i.e., substantive*, matters, to be valid must include the concurring votes of the five permanent members among the seven affirmative votes (Article 27 (3)).⁸² This voting formula gives each of the five great Powers a veto over every decision to be made in substantive matters. The only limitation is that the veto is inapplicable in the settlement of disputes before the Security Council to the extent that "a party to a dispute shall abstain from voting" (Article 27 (3)). But it can be applied when enforcement measures under Chapter VII are under consideration and, hence, any one of the five great Powers can by its veto block the adoption by the Security Council of a decision to take enforcement action. While according to Article 25 all Members of the United Nations are bound "to accept and carry out the decisions of the Security Council" once the decisions have been made, the five great Powers are not bound to concur in such decisions and are free to prevent them.

Thus we see that in the Security Council there exists not only no equality of representation ~~as shown before~~ but also no equality of voting power, whereas in the Council of the League, although there was no equality of representation, there was equality of voting power for all members of the Council. Moreover, as has been shown, the Security Council has real powers of decision under Chapter VII, such as the Council of the League never possessed.⁸³ Hence, the obligation to accept and carry out the de-

⁸⁰ See also Goodrich and Hambro, *op. cit.*, pp. 208-209.

⁸¹ Art. 25 creates a *special* obligation based upon the *general* obligation of Art. 2 (2).

⁸² This is the general principle. See, however, Yuen-li Liang, "Abstention and Absence of a Permanent Member in Relation to the Voting Procedure in the Security Council," this JOURNAL, Vol. 44 (1950), pp. 694-708; see also Goodrich and Hambro, *op. cit.*, p. 223; Padelford, "The Use of the Veto," International Organization, Vol. 2 (1948), p. 245; J. L. Kunz, editorial comment in this JOURNAL, Vol. 45 (1951), pp. 137-142. For two opposing views, see Leo Gross, "Voting in the Security Council: Abstention from Voting and Absence from Meetings," Yale Law Journal, Vol. 60 (1951), pp. 209-257; M. S. McDougal and R. N. Gardner, "The Veto and the Charter: An Interpretation for Survival," *ibid.*, pp. 258-292.

⁸³ The Security Council has also been empowered to "make recommendations or decide upon measures to be taken to give effect to the judgment" of the International

cisions of the Security Council entails a surrender of sovereignty to the Organization to a considerable extent on the part of those states which are bound by the decisions of the Security Council *without* their consent, either because they did not participate in the adoption of the decisions due to their non-membership in that organ—which is true for all but eleven Members of the United Nations—or because they are non-permanent members of the Security Council which have not concurred in particular decisions.

However, the five great Powers are not only not bound by decisions in which they have not concurred—this is also the general rule in regard to treaty obligations—but they can even prevent a decision from being made, by interposing their veto.⁸⁴ The five great Powers have thus been accorded a privileged position in the Security Council which singles them out from all the other Members of the United Nations; and since they alone have retained the veto in the Security Council while all the other Members—who still possessed it in the Assembly and Council of the League—have now lost it, the position of the five great Powers has even been enhanced. On the basis of the preceding analysis, it can, therefore, be concluded that in the most important sphere of action of the United Nations, where the Organization was given real powers of dealing with threats of or acts of aggression by means of enforcement action, the doctrine of equality, upon which the Organization is still based (Article 2 (1)), has been discarded in relations between the five great Powers and all the other Members of the United Nations, with the following results: The five great Powers possess equality among themselves. All the other Members are also equal among themselves. But there is no equality between the five great Powers and all the other Members, because of the privileged position of the former.)

As will be seen from the later analysis, this is the only field in which the doctrine of equality has been abandoned; it is a limited field, but at the same time the most important of all. (In the sphere of international legislation the doctrine still holds true, as has been shown above, that a state cannot be bound by any treaty to which it has not become a party by its consent. Likewise, matters which are essentially within the domestic jurisdiction of any state (not only a Member) are excluded from the competence of the United Nations, except for enforcement measures under Chapter VII, in case such domestic matters endanger international peace and security (Article 2 (7)).)

Court of Justice, if any party fails to comply with the decision (Art. 94). This power of the Security Council goes farther than the corresponding power conferred by the Covenant (Art. 13 (4)) upon the League Council. Yet this power will not be of great practical importance as long as the jurisdiction of the International Court remains *voluntary*.

⁸⁴ The most important practical consequence of a great-Power veto is that no enforcement measures can be taken against a permanent member of the Security Council. On the great-Power veto, see especially Lee, "The Genesis of the Veto," *International Organization*, Vol. 1 (1947), pp. 33-42; Padelford, *loc. cit.*, pp. 227-246; Goodrich and Hambro, *op. cit.*, pp. 213-227.

There are other instances under the Charter in which the five great Powers enjoy a privileged position by virtue of their permanent membership in the Security Council and, hence, can exercise the veto power whenever their concurrence is a *conditio sine qua non* for bringing about certain results. These instances are the following: The admission (Article 4), suspension (Article 5), and expulsion (Article 6) of Members, as well as the appointment of the Secretary General (Article 97) by the General Assembly, are dependent upon the *recommendation* of the Security Council. Since all these are non-procedural matters, the great-Power veto may be used (Article 27 (3)).⁸⁵ A further instance is the procedure for amending the Charter: Although amendments to the Charter may be "adopted by a vote of two-thirds of the Members of the General Assembly," they do not come into force unless ratified "by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council" (Article 108). Here again, any one of the five great Powers can by its refusal to ratify the adopted amendment prevent its coming into force.⁸⁶

But in all these cases there is no question of imposing new obligations on the other Members of the United Nations without their consent, as is the case in the sphere of enforcement measures (Chapter VII). Even in the matter of Charter amendment this is not the case, notwithstanding the Charter's provision (Article 108) that amendments, duly adopted and ratified according to the above-quoted requirements, "shall come into force for all Members of the United Nations . . ." Although the Charter, unlike the League Covenant, withdrawal from the Charter is not agreed during the draft, for good reason, and it has not demanded to withdraw from the Charter in which it has required a two-thirds majority. The Charter in which it has required a two-thirds majority of states to be adopted but fail

⁸⁵ This is the generally accepted view, e.g., Oppenheim, *International Law*, 8th ed., p. 107; Eagleton, *International Law*, p. 107; also Advisory Opinion of the International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of Crimes Against Humanity*, 1951, p. 4. For a dissenting view, see *Report of the Secretary-General of the United Nations* (1949), pp. 246-261.

⁸⁶ The procedure for ratification, Art. 109, would lead to the same result.

The amendment of the Charter follows the procedure provided in Art. 108.

⁸⁷ See "Declaration of Principles of the Charter of the United Nations," pp. 143-144, and document A/Conf. 1/L.2, para. 1. Cf. also Art. 26 (2) of the Charter.

other Members which are not the five great Powers, since no amendment could come into force without ratification by the latter. Inasmuch as the other Members remain free to avoid a change in their rights and obligations adopted *without* their consent, by withdrawing from the Organization, their equality cannot be considered impaired. Hence, it is only in the composition of the Security Council and in the jurisdiction of this organ in regard to enforcement action that the doctrine of equality has been modified.

d. The International Court of Justice

The last organ to be considered in our analysis is the International Court of Justice. As "the principal judicial organ of the United Nations"⁸⁸ it is the only other organ, besides the Security Council, that has the power of making decisions binding upon states. But, as already stated above, while the decisions of the Security Council are binding upon all Members of the United Nations,⁸⁹ the decisions of the International Court are binding only upon the parties to the dispute, regardless of membership in the United Nations, and only "in respect of that particular case,"⁹⁰ thereby excluding the Anglo-American doctrine of *stare decisis* in the adjudication of the Court. All decisions of the Court are made by a majority of the judges present,⁹¹ with a quorum of nine judges constituting the Court,⁹² the presiding judge having a casting vote in case of a tie.⁹³ As already seen, each party has a right to have a "national judge" on the Bench.⁹⁴ But even if this judge should be regarded as a "representative" of his state—which legally he is not⁹⁵—he has only one vote and, of course, no "veto" and, hence, could do very little to sway the opinions of enough other judges to make such an at-

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or not they are great Powers or Members of the United Nations.⁹⁸ Furthermore, jurisdiction of the International Court is *voluntary* and, even if the states agree to accept the "optional clause" of Article 36 of the Statute, making the Court's jurisdiction *compulsory* for themselves, they may attach various reservations to this obligation, as almost all states have done, and at any rate recover full freedom of action if they should choose not to renew this option after the expiration of the period for which such an obligation has been undertaken. For all these reasons it cannot be said that the principle of state equality has been modified by the establishment, jurisdiction, and majority decisions, of the World Court.

In this connection it might also be stated that as long as the jurisdiction of the International Court remains, as at present, voluntary or, at the most, optional compulsory, it cannot be assumed that there has been on the part of the states any surrender of sovereignty to the Court. The legal situation might be different if the states were to accept obligatory jurisdiction of the World Court for all their disputes. During the San Francisco Conference there was extensive discussion on the proposal to confer such jurisdiction upon the Court.⁹⁹ But this proposal was finally not adopted, which shows that the states would have considered obligatory jurisdiction of the Court as a partial surrender of their sovereignty, if not equality, a step which they were not prepared to take.¹⁰⁰

Kelsen¹⁰¹ tries to prove that even if compulsory jurisdiction were conferred upon the World Court, this would not impair sovereignty. We would agree with this general conclusion,¹⁰² but would make the following distinction: One can only speak of a surrender of sovereignty¹⁰³ if new obligations are imposed upon a state without its consent. This could be done by means of international legislation adopted by majority vote with binding effect upon the dissenting minority, which at present is only a hypothetical case; or it can be done by Security Council resolutions to take enforcement action, which are binding upon Member States not represented on the Council and upon non-permanent Council members which have not concurred in the resolutions, which could be a very practical case. (However, it cannot be regarded as a surrender of sovereignty if a court,

⁹⁸ Cf. *ibid.*, Art. 35, especially par. 2, which safeguards the *equality* before the Court of states which are not parties to its Statute.

⁹⁹ The Draft Statute of the Permanent Court of International Justice had already provided for compulsory jurisdiction, but the final Statute of that Court reverted to voluntary jurisdiction, with the optional feature of Art. 36.

¹⁰⁰ On the question of obligatory jurisdiction, see Goodrich and Hambro, *op. cit.*, pp. 478-481, and UNCIO, Report of the Rapporteur of Committee IV/1, Doc. 913, IV/1/74(1), pp. 10-12 (Documents, XIII, pp. 390-392), quoted there, pp. 479-480.

¹⁰¹ *Loc. cit.*, Yale Law Journal, Vol. 53 (1944), pp. 215 ff.

¹⁰² Although not entirely with the argumentation used by Kelsen to back up this conclusion.

¹⁰³ This would also include a violation of the principle of equality.

possessing compulsory jurisdiction, has by its decision imposed obligations upon a party.)

It is the function of the International Court of Justice to decide disputes "in accordance with international law,"¹⁰⁴ which means the Court can only apply *lex lata*—existing international law—and would exceed its competence if it were to decide the case *de lege ferenda*. The Court can only declare what the law in the case is, and the obligations which it imposes upon a party can only be obligations which already exist under international law, but which have only now by the Court's decision been confirmed as existing and binding upon the party which is held liable to fulfil them. (Hence, the Court does not create and impose *new* obligations, but only declares and specifies what it has found to be the *existing* obligations.) As an expert body, independent of the parties to the dispute, it decides this question in an objective way and with finality.¹⁰⁵ The state which has been found liable now knows what its obligations really are. However, it does not assume any obligations which have not existed prior to the decision of the Court but ones which have only been disputed by the parties. The Court has only authoritatively stated, clarified, and crystallized the obligations prescribed by international law.¹⁰⁶ Since no new obligations have been imposed upon the state, we are not justified in speaking of a surrender of sovereignty on its part. The Court functions here only as an independent and impartial arbiter which, by investigating the dispute, assists the parties in establishing the facts and determining the existence and extent of their respective obligations.¹⁰⁷

¹⁰⁴ Statute, Art. 38.

¹⁰⁵ "The judgment is final and without appeal." Statute, Art. 60.

¹⁰⁶ Opposing the traditional idea of a judicial function, Kelsen, however, maintains that the judicial decision is not a merely declaratory, *i.e.*, law-applying, but a highly constitutive, *i.e.*, law-creating, act. See Kelsen, *loc. cit.*, pp. 217-218, and General Theory of Law and State, pp. 132-136, 273. For the traditional view, *cf.* Morgenthau, *Politics among Nations* (1948), pp. 341-349, especially pp. 341-343.

¹⁰⁷ In this article we have examined the present *legal position* of the traditional doctrine of the equality of states with due regard given to its recent modifications. However, we would not advocate the preservation of the doctrine *de lege ferenda*. A strengthened international organization, invested with powers of decision, should not be hampered by the principle of equality. Some system of proportionate representation would have to be devised which would take into account not only size of population but also economic and political importance of the member states and which would offer sufficient protection to the more important states, thus making it possible to eliminate the absolute veto of any single Power, but which would also assure some representation to each small state. For proposals along such lines, see L. B. Sohn, "Weighting of Votes in an International Assembly," *American Political Science Review*, Vol. 38 (1944), pp. 1192-1203; *idem*, "Multiple Representation in International Assemblies," this *JOURNAL*, Vol. 40 (1946), pp. 71-99; Q. Wright, L. Sohn, "Weighted Representation in a World Legislature," *Common Cause*, Vol. 3 (1949), pp. 72-81, Wright offering "A Survey" (pp. 72-77) and Sohn submitting "A New Proposal" (pp. 77-81), containing a simplified formula as compared with that of 1944. See also Potter, *International Organization*, p. 124.

THE SO-CALLED DOUBLE VETO *

SOME CHANGES IN THE VOTING PRACTICE OF THE SECURITY COUNCIL

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The veto question, one of the most controversial problems facing the United Nations, has several aspects of unequal importance. First, there is the great political problem of the relations between the great Powers on the one hand, and the small and middle-sized states on the other, as well as of their rôle in an international organization. This problem, being a political one, is reflected in the whole constitutional structure and functions of the organs of the United Nations. Second, there is the well-established traditional legal principle of equality of states, big and small, mighty and weak. This principle was reiterated in the United Nations Charter in Article 2 (1), which reads: "The Organization is based on the principle of the sovereign equality of all its Members." Both these aspects of the veto question are well known and have been discussed to such an extent as to be entirely left aside in these remarks.

There exists however a third aspect of the veto which is generally overlooked and insufficiently known, namely, the procedural aspect. The procedure of the Security Council, where, and where only, the veto power of the five permanent members applies, has undergone serious and quite important changes since the Security Council started functioning in London on January 17, 1946.

THE PROBLEM

Article 27 of the Charter of the United Nations entitled "Voting" and containing the famous "Yalta Voting Formula" reads as follows:

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on *procedural* matters shall be made by an affirmative vote of seven members.
3. Decisions of the Security Council on *all other* matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.¹

* This paper was submitted for publication in its original form in January, 1950, and stressed the far-reaching potentialities hidden in the procedure followed during the 303rd meeting on May 24, 1948, in the Czechoslovak case. In the meantime those implications became fully apparent in the method of dealing with the double veto adopted by the Security Council on Sept. 29, 1950, in the Formosa question (506th and 507th meetings).

¹ Italy added.

Two different voting methods are based on a distinction between "procedural" and "all other" (non-procedural) matters. Therefore two interconnected legal problems always arise when this article has to be applied in practice: (I) Is the matter to be voted upon a procedural one or not? (The so-called *preliminary question*.) Should there be no agreement between the members of the Security Council on that point a second question becomes important: (II) Whether a procedural or non-procedural vote has to be taken in order to resolve the preliminary question.²

I. Without attempting to give a survey of matters to be considered as procedural within the meaning of paragraph 2 of Article 27³ the point must be stressed that in spite of several efforts to fix the domain of procedural and non-procedural items (by interpretation of the Charter, rules of procedure of the Security Council, precedents, understanding of the permanent members incorporated in the San Francisco Declaration of June 7, 1945, and recommendation of the General Assembly of April 14, 1949, Resolution No. 267 (III)), a large disputed border zone still remains, thus giving to the problem of the double veto a more than academic interest. The general public still seems to share the Soviet anarchical attitude that a great Power has the right to use the double veto arbitrarily in any matter (even a procedural one) when it finds such a use expedient for political reasons.

WHAT IS PROCEDURAL

Turning to question I, it must be noted that the delimitation of the procedural field has been attempted by *semi-authoritative definition* accompanied by examples of categories of procedural items and by the device of *enumeration* of such categories. From the point of view of juridical logic it is quite sufficient to give only one definition or one enumeration covering the "procedural" area without entering into the field of "all other" (substantive) matters. What does not fit into the framework of "procedure" is *eo ipso* a matter of substance.⁴

² If a qualified majority is required, any permanent member has the so-called *double veto*. The problem of the double veto contains furthermore two important ancillary problems: (a) *Who* has the power and authority to decide such a "preliminary question"? The obvious answer is: the Security Council itself. The right of the President to make a ruling that a matter is procedural is confirmed by practice but still contested. (b) May the preliminary question be properly raised and the right to use the double veto invoked in connection with *any* matter, or only when a *reasonable doubt* exists as to the procedural nature of the matter? (Limited or unlimited use of the double veto, discretionary power of permanent members.)

³ For a full discussion of that problem see Eduardo Jiménez de Aréchaga, *Voting and the Handling of Disputes in the Security Council* (Carnegie Endowment for International Peace, 1950), pp. 6-9.

⁴ Aréchaga, *loc. cit.*, p. 9, the "non-procedural" concept as a "residual" area.

Definition

In view of the fact that the Yalta formula uses "*procedural* matters" as its point of departure, it is at least unexpected to find that the well-known "Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council," dated San Francisco, June 7, 1945, starts from the opposite direction and attempts to give a kind of definition of *substantive* matters. Paragraph 1 of Part I of said statement speaks of "two broad groups of functions" (of the Security Council) and proceeds with the following formula:

Under Chapter VIII [of the Dumbarton Oaks Proposals], the Council will have to make decisions which involve its taking *direct measures* in connection with settlement of disputes, adjustment of situations likely to lead to disputes, determination of threats to the peace, removal of threats to the peace, suppression of breaches of the peace. It will also have to make decisions which do not involve the taking of such measures. . . . The first group of decisions will be governed by a qualified vote. . . .⁵

Paragraph 4 adds:

Beyond this point [consideration and discussion by the Council of a dispute or situation and hearing of parties to such disputes], decisions and actions by the Security Council may well have *major political consequences* and may even initiate a *chain of events* which might, in the end, require the Council under its responsibilities to invoke measures of enforcement under Section B, Chapter VIII [Present Chapter VII]. This chain of events begins when the Council decides to make an investigation, or determines that the time has come to call upon the states to settle their differences, or makes recommendations to the parties. It is to such decisions and actions that unanimity of the permanent members applies. . . .⁵

Paragraph 5 gives some "illustrative" examples.

The above attempted definition is patently inadequate because it covers only functions under Chapters VI and VII of the Charter and omits entirely all other functions and powers of the Security Council such as admission of new members (Article 4), suspension and expulsion of members (Articles 5 and 6), recommendation for appointment of the Secretary General (Article 97), various kinds of decisions in connection with the International Court of Justice, with the trusteeship of strategic areas, etc.

It is equally strange and noteworthy that nobody in the Security Council nor in its Committee of Experts (a standing committee on procedure) ever seriously attempted to draft a definition of what constitutes a procedural matter. The nearest approach to such definition was made by

⁵ Italics added.

Vyshinsky when he said on February 4, 1946, during the 7th meeting of the Security Council:

3) What is procedure? Procedure is the order of discussion, the manner of taking decisions. In short, procedure is order, means, methods.⁶ 4

Such a definition, in spite of its purely theoretical appeal, is obviously much too limited and certainly in contradiction with matters listed in the Charter under the heading "Procedure" and with the San Francisco Statement.

Only the Interim Committee of the General Assembly made a serious effort in its report on "The Problem of Voting in the Security Council" ⁷ to specify certain criteria for such a definition of procedural matters. They are:

1. . . . all decisions adopted in application of provisions which appear in the Charter under the heading "Procedure"
2. . . . all decisions which concern the relationship between the Security Council and other organs of the United Nations . . . [and thus] relate to the internal procedure of the United Nations
3. . . . all decisions of the Security Council which relate to its internal functioning and the conduct of its business
4. . . . certain decisions of the Security Council which bear a close analogy to decisions included under the above-mentioned criteria
5. . . . certain decisions of the Security Council . . . which are instrumental in arriving at or in following up a procedural decision. . . .⁸

However, the General Assembly itself did not follow the second criterion, omitting in its resolution of April 14, 1949, No. 267 (III), "The Problem of Voting in the Security Council" (based on the above-quoted report of the Interim Committee), from the annex listing "Decisions Deemed Procedural" requests to the International Court of Justice for an advisory opinion on a legal question. The representatives of Belgium and Norway in the Interim Committee reserved their position as to the first criterion.⁹ It must be also remembered that the resolution of the General Assembly of April 14, 1949, No. 267 (III), represents only a recommendation and is therefore legally not binding on the Security Council nor on its members and is consistently being ignored by the Soviet *bloc*. Therefore only the hard core of decisions relating to internal functioning and the conduct of business of the Security Council itself (criterion 3) seems to remain uncontested and beyond dispute, leaving a large disputed border area.

Enumeration

7) Enumeration of all decisions of a procedural nature represents a second approach to the question of what is procedural. That is what the General 4

⁶ Security Council, 1st Year, Official Records, 1st Ser., No. 1, p. 130.

⁷ U.N. Doc. A/578, July 15, 1948.

⁸ *Ibid.*, pp. 4-5.

⁹ *Ibid.*, p. 4.

Assembly tried to achieve in the above-mentioned resolution of April 14, 1949, listing in its annex 35 categories of decisions deemed procedural and recommending to the members of the Security Council "that the members of the Security Council conduct their business accordingly."¹⁰ This last expression, "conduct their business accordingly," was explained in Part III of the Report of the Interim Committee, under the heading "Implementation by means of interpretation of the Charter," as meaning that the recommendation to consider the items enumerated as procedural

would apply to the positions which the members of the Security Council take on the question whether or not any of these items is procedural in case this question is raised; to the manner in which any member of the Security Council, when acting as President, interprets the result of a vote on such a question; and finally, to the manner in which the members of the Security Council vote if the ruling made by the President is challenged.¹¹

Obviously "all other" decisions not listed in the annex should be considered as governed by the qualified vote under paragraph 3 of Article 27 until the permanent members agree otherwise following a recommendation in paragraph 2 of said resolution. The moral and political weight of that resolution of the General Assembly was greatly enhanced by the strong endorsement it received on September 29, 1950, from the United States representative in the Security Council in connection with the overriding of the attempt by the representative of Nationalist China to use the double veto in order to kill an invitation to the Peiping Government in connection with the question of Formosa.

Nevertheless, the problem remains alive because an enumeration of 35 categories of decisions of the Security Council based on the provisions of the Charter may well encounter practical difficulties in cases not covered explicitly by the Charter, as well as in cases where a matter seems to be covered by two or more of its provisions, only one of them being procedural. The problem of what constitutes an investigation is a good example of the latter category. Furthermore, the Soviet Union consistently refuses to recognize the resolution of the General Assembly of April 14, 1949, and claims several categories of decisions listed in the annex to be matters of substance.¹²

HOW TO VOTE ON THE PRELIMINARY QUESTION

II. Therefore, the second problem still is of practical importance. The contingency may well arise that a decision may have to be taken whether or

¹⁰ General Assembly, 3rd Sess., Pt. II, Official Records, Resolutions, p. 7.

¹¹ U.N. Doc. A/578, p. 39.

¹² *E.g.*, Vyshinsky maintained during the discussion of the Acheson Plan (Uniting for Peace) that a decision of the Security Council to convoke a special session of the General Assembly is subject to the veto (357th meeting, Oct. 10, 1950, General Assembly, 5th Sess., Official Records, First Committee, p. 85).

not a certain matter is procedural within the meaning of paragraph 2 of Article 27.

The well-known "Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council," issued June 7, 1945, in San Francisco, contains in Part II an answer to the following question 19 submitted by a subcommittee of Committee III/1:

In case a decision has to be taken as to whether a certain point is a procedural matter, is that preliminary question to be considered in itself as a procedural matter or is the veto applicable to such preliminary question?

The answer of the Big Four (France acceded later) reads:

1) In the opinion of the Delegations of the Sponsoring Governments, the Draft Charter itself contains an indication of the application of the voting procedures to the various functions of the Council.

2) In this case it will be unlikely that there will arise in the future any matters of great importance on which a decision will have to be made as to whether a procedural vote would apply. Should, however, such a matter arise, the decision regarding the preliminary question as to whether or not such matter is procedural must be taken by a vote of seven members of the Security Council, including the concurring votes of the permanent members.

The difference between the "double veto" and the regular veto is that the casting of a negative vote by a permanent member on a matter of substance results in blocking the adoption by the Security Council of the vetoed draft resolution and creates thereby a vacuum, whereas the casting of a negative vote by a permanent member on a "preliminary question" results in a positive decision of the Council to apply the voting procedure foreseen in Article 27, paragraph 3 (for non-procedural matters) to the draft resolution under consideration.

The San Francisco Statement on Voting Procedure was not accepted by the San Francisco Conference, *i.e.*, no vote was taken on it; only the Yalta formula now contained in Article 27 of the Charter was voted upon.¹³ Therefore the statement itself as *res inter alios acta* does not bind legally any Member of the United Nations other than the five permanent members of the Security Council. Such an opinion was expressed in the Security Council not only in strong terms by representatives of small and medium-sized Powers,¹⁴ but also more than once by the Soviet delegate.¹⁵

Nevertheless, the legal question is not so simple as that. The San Francisco Declaration affects the voting procedure of one of the principal

¹³ Wellington Koo Jr., *Voting Procedure in International Political Organizations* (1947), pp. 157-158.

¹⁴ *E.g.*, Australia, U.N. Doc. S/P.V. 49, p. 71; Argentina, U.N. Docs. A/AC. 18/SR. 19, p. 7, S/P.V. 303, pp. 41-42; Syria, Security Council, 3rd Year, Official Records, No. 73, p. 4; Belgium, *ibid.*, p. 23; Colombia, *ibid.*

¹⁵ U.N. Docs. S/P.V. 202, pp. 161, 171, S/P.V. 303, p. 28.

organs of the Organization (Article 7 of the Charter) charged with primary responsibility for the maintenance of international peace and security acting on behalf of all Member States (Article 24 of the Charter).— It is legally paradoxical to conceive a situation where 5 permanent members of an organ apply one set of rules of procedure and the remaining 6 non-permanent members acknowledge a different and contradictory one of their own. During a month in which a representative of a permanent member takes the chair the result of a vote taken would be construed as “not carried,” whereas during the next month a delegate from a non-permanent member acting as President would announce the result of an exactly analogous vote as “carried.” The Security Council would have two conflicting procedures replacing each other at irregular intervals. The representative character of the President (Rule 19) and of the members of the Security Council supposed to act on behalf of the Organization as a whole and all its Members (Article 24, paragraph 1, of the Charter) would vanish completely.

It is therefore not surprising that the practice of the Security Council did not push the consequences of the non-acceptance of the San Francisco Declaration by the small and medium-sized Powers that far. The San Francisco Statement was applied also by presidents of the Council who were delegates of non-permanent members (Mexico,¹⁶ Poland¹⁷). But a

¹⁶ On June 26, 1946, during the 49th meeting of the Security Council a vote was taken on a draft resolution prepared by Australia and the United Kingdom stating in the preamble that the investigation of the situation in Spain by a subcommittee appointed by the Security Council had fully confirmed the facts which led to the condemnation of the Franco régime and that the subcommittee was of the opinion that the situation in Spain is one the continuance of which is likely to endanger the maintenance of international peace and security. The operative part of the draft resolution contained a decision by the Security Council to keep, without prejudice to the rights of the General Assembly, the situation in Spain under continuous observation in order to be at all times ready to take such measures as may become necessary to maintain international peace and security. (Security Council, 1st Year, Official Records, 1st Ser., No. 2, p. 401.) The vote was 9 in favor and 2 against (Poland and U.S.S.R.). The President, Mr. Nájera (Mexico), declared the resolution carried, being of a procedural character (*ibid.*, p. 413), but was challenged by Mr. Gracmyko (U.S.S.R.), who considered the resolution as concerning questions of substance and consequently his vote as a veto (*ibid.*, pp. 413–414). The ruling of the President was put to the vote by asking “those who are in favour . . . that this is a question of procedure” to raise their hands. There were 8 votes in favor, 2 against (France, U.S.S.R.), and 1 abstention (Poland) (*ibid.*, p. 421). Mr. Nájera (Mexico) announced: “if it is to be decided whether a question is one of procedure or substance, it is necessary to accept one or another alternative by seven votes but the five permanent members must concur. Here we have two of the permanent members deciding, against the others, that it is a question of substance.” (*Ibid.*, pp. 421–422.) Thus the President applied the San Francisco Statement and not Art. 27 of the Charter as was immediately pointed out by Mr. van Kleffens (Netherlands) (*ibid.*, p. 423).

¹⁷ The application of the San Francisco Statement in the question of admission of

very important change in the practice of the Security Council has nevertheless taken place. This change consists in the acceptance by the United States, Great Britain, France and the small and medium Powers outside the Soviet orbit of an interpretation of Part II of the San Francisco Statement prohibiting the application of the double veto to clearly procedural matters. The result is that the Security Council has now actually two voting procedures, depending upon whether a Soviet delegate or another delegate occupies the chair. Technically this change affects the relation between Part II of the San Francisco Statement and Rule 30 of the "Provisional [in fact permanent] Rules of Procedure of the Security Council" which reads:

If a representative raises a point of order, the President shall immediately state his ruling. If it is challenged, the President shall submit his ruling to the Security Council for immediate decision and it shall stand unless overruled.

What is a "point of order"? Without attempting to give a clear-cut definition,¹⁸ it is sufficient to stress that it is closely connected with the application of rules of procedure and with the powers of the President to conduct the proceedings of the Council. Therefore, the President has not only often ruled whether a certain motion has precedence over another motion (Rules 32, 33, 35 and 36), but has several times ruled also whether a motion is a procedural one or not (his right to make the latter ruling is controversial).¹⁹

The best way of showing the evolution which occurred in the Council procedure is by comparing the procedure followed (A) on August 29, 1946, in considering the admission of Albania on the one hand, and (B) on May

Albania to membership (57th meeting, Aug. 29, 1946) will be discussed below in detail (see A).

¹⁸ The Special Committee on Methods and Procedures of the General Assembly inserted in its report to the 4th session (Doc. A/937, Aug. 12, 1949) the following statement (par. 37, p. 30): "It is the opinion of the Special Committee that a valid point of order may relate to the manner in which the debate is conducted, to the maintenance of order, to the observance of the rules of procedure or to the manner in which Chairmen exercise the powers conferred upon them by the rules. Thus . . . representatives are enabled to direct the attention of the presiding officer to violations or misapplications of the rules of procedure by other representatives or by the presiding officer himself."

¹⁹ The Soviet delegate, acting as President during the consideration of the Greek question (S/P.V. 202, Sept. 15, 1947), after having announced "we shall follow the procedure defined in par. 3 of Art. 27 of the Charter" (in voting on the proposed United States resolution), expressed the view: "As President of the Security Council I have to say that whether the question is one of procedure or of substance is not subject to the ruling of any President. The Security Council has to take a special decision on this question" (p. 132). "The President can only make a ruling on a point of order. The President cannot decide that the question is one of substance or procedure" (p. 146). It is under these circumstances not astonishing that the Australian delegate wondered whether the President did or did not rule how to vote (p. 136).

24, 1948, in the question of Czechoslovakia, as well as (C) on September 29, 1950, in the Formosa question, on the other hand.²⁰

A. Albanian Case

The consideration of the Albanian application for membership in the United Nations was, upon motion by the United States, postponed by the Security Council during its 18th meeting on February 13, 1946, "until the Security Council convenes at the temporary headquarters." The President ruled the resolution to be a procedural matter, nobody challenged the ruling and the resolution was adopted by a procedural vote.²¹

During the 57th meeting on August 29, 1946, at Lake Success the United States proposed a further postponement of the voting on the Albanian application until the following year (1947). A discussion arose whether such a motion was not a virtual rejection of the application and therefore not of a purely procedural character. The President (Lange, Poland), "in order to maintain the continuity of Presidential rulings" (analogously as in London), ruled the motion to be *procedural*,²² and in consideration of the opposite view expressed during the discussion by the delegate of the U.S.S.R., submitted his ruling to a vote, asking: "Those who agree with the ruling that it is a matter of procedure will raise their hands." There were 5 votes in favor, 4 against, and 2 abstentions. The 4 voting in the negative were *China, France, the United Kingdom and the U.S.S.R.*²³ The President announced that since 4 permanent members voted against the ruling, therefore "we shall have to treat the resolution asking to postpone the voting on Albania as a matter of substance, not of procedure." A discussion followed, the Dutch delegate asserting that in order to overrule the President the concurring votes of 5 permanent members are necessary, and the Australian delegate stressing the point that under Rule 30 a majority of the Council, i.e., 7 negative votes against the ruling, is indispensable. The President formulated his appraisal of the result of the voting "in the form of a [second] ruling" and asked for challenge. The U. S. delegate, who voted for considering his draft resolution as procedural, nevertheless accepted the second ruling declaring it a

²⁰ In contrast to the many instances of the use of the regular veto, the so-called double veto has so far been applied effectively four times and once without result. In all four cases it was the Soviet Union which cast its double veto: (1) In the Spanish question on June 26, 1946 (49th meeting, Pres. Nájera, Mexico); (2) in the question of admission of Albania to membership on Aug. 29, 1946 (57th meeting, Pres. Lange, Poland); (3) in the Greek question on Sept. 15, 1947 (202nd meeting, Pres. Gromyko, U.S.S.R.); (4) in the Czechoslovak question on May 24, 1948 (303rd meeting, Pres. Parodi, France). The unsuccessful attempt was made by China in the question of Formosa on Sept. 29, 1950 (506th and 507th meetings, Pres. Jebb, U.K.).

²¹ Journal of the Security Council, No. 14, pp. 260-262.

²² Security Council, 1st Year, Official Records, 2nd Ser., No. 5, pp. 125-127.

²³ *Ibid.*, pp. 128-132.

matter of substance, without, however, committing his government. The Australian and Dutch delegates "emphatically disagreed" with the President's evaluation of the vote, but refrained from challenging it.²⁴

Three points are clear from the foregoing case. Paragraph 2 of Part II of the San Francisco Statement was applied to a vote taken under Rule 30 when the (first) ruling of the President settled the question "whether a procedural vote would apply." The challenged ruling was submitted to the vote in its original form²⁵ and not as to whether it should be annulled. The result of the vote on the (first) ruling as construed by the President was turned by him into a (second) ruling open to further challenge.²⁶

B. Czechoslovak Case

Let us compare another case. On May 21, 1948 (300th meeting), during the deliberations on the question of Czechoslovakia, the President (Parodi, France) announced his intention to submit to the vote first of all the following question: "Is the vote (which will be taken) on the draft resolution [of the delegate from Chile sponsored under Rule 38 by the delegate from Argentina and proposing to set up a committee for the purpose of hearing witnesses] itself one that concerns procedure?"²⁷ A thorough and prolonged discussion followed concerning the legal status of the San Francisco Declaration, whether the Chilean resolution called for investigation and inquiry (Article 34 the Charter and paragraphs 4 and 5 of Part I of the San Francisco Declaration),²⁸ or whether it was purely procedural, calling

²⁴ *Ibid.*, pp. 132-135.

²⁵ Security Council, 1st Year, Records, 2nd Ser., No. 5, p. 132. The President (Lange, Poland) said: "The question which the Council was asked was whether it supports my ruling that this is a matter of procedure. . . . I have not asked for the opposite question." *Ibid.*, p. 133.

²⁶ *Ibid.*, p. 134.

²⁷ U.N. Doc. S/P.V. 300, p. 51.

²⁸ Art. 34 of the Charter: "The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security."

Pars. 4 & 5 of Part I of the San Francisco Declaration:

"4. Beyond this point, decisions and actions by the Security Council may well have major political consequences and may even initiate a chain of events which might, in the end, require the Council under its responsibilities to invoke measures of enforcement under Section B, Chapter VIII. This chain of events begins when the Council decides to make an *investigation*, or determines that the time has come to call upon states to settle their differences, or make recommendations to the parties. It is to such decisions and actions that unanimity of the permanent members applies, with the important proviso, referred to above, for abstention from voting by parties to a dispute.

"5. To illustrate: in ordering an *investigation*, the Council has to consider whether the investigation—which may involve calling for reports, hearing witnesses, dispatching a commission of inquiry, or other means—might not further aggravate the situation. After investigation, the Council must determine whether the continuance of the situa-

for establishing a subsidiary organ necessary for the performance of functions of the Security Council (Article 29 of the Charter under the heading "Procedure" and Rule 28).²⁹ The vote was taken on May 24, 1948 (303rd meeting), the result being 8 for considering the Chilean resolution as one of procedure, 2 against (U.S.S.R. and Ukrainian S.S.R.), and 1 abstention (France).³⁰ The President (Parodi, France) made an interpretation of the vote stressing that he "as a representative of a permanent member of the Security Council cannot ignore the San Francisco Declaration," and added that precedents show "on one occasion at least" the President was a representative of a non-permanent member, yet the provisions of the Declaration of San Francisco were taken into account."³¹ The President gave his reasons based on the San Francisco Declaration and pronounced his interpretation of the result of the vote to the effect that the Chilean draft resolution should be regarded as a matter of substance.³² He was promptly challenged by the representatives of Argentina, Canada, Belgium and Colombia, whereupon he declared that he

considered that Rule 30 of the rules of procedure was applicable, as I think we are dealing with a point of order. . . . I must . . . put to the vote the annulment of my ruling in conformity with Rule 30. Nevertheless . . . in certain other cases of disagreement it was the President's ruling which was put directly to the vote.³³

The representative of the U.S.S.R. stressed the point that

no vote which the Security Council can now take can weaken or annul the Presidential ruling. The alternative would be that the question as to whether the resolution was procedural or non-procedural would, by the process of voting, by various stages be reduced to a point of order, which would be an absurdity.³⁴

The President nevertheless asked the representatives to decide on the following proposition: "Will those who object to my interpretation raise their hands?" 6 delegates voted against the President's ruling (Argentina, Belgium, Canada, *China*, Colombia, Syria), 2 delegates voted in favor (Ukrainian S.S.R., U.S.S.R.), and 3 delegates abstained (France, United Kingdom, United States). The President declared: "In favour of annul-

tion or dispute would be likely to endanger international peace and security. If it so determines, the Council would be under obligation to take further steps. . . ."

²⁹ Art. 29 of the Charter: "The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions." Rule 28: "The Security Council may appoint a commission or committee or a rapporteur for a specified question."

³⁰ Security Council, 3rd Year, Official Records, No. 73, p. 19.

³¹ As already pointed out above, there were in fact two such occasions (Mexico, 49th meeting, and Poland, 57th meeting).

³² *Ibid.*, pp. 19-21.

³³ *Ibid.*, p. 24.

³⁴ *Ibid.*, pp. 23-24.

ling the Presidential ruling 6 votes were cast: there were 2 opposed votes and 3 abstentions. Therefore, my ruling stands."³⁵ The delegate for the U.S.S.R. asked whether the representative of China really voted against the ruling and the Chinese delegate answered in the affirmative. The Soviet delegate made a statement to the effect that "only irresponsible people could act in the manner in which the representative of China has just acted," but did not question the result of the vote.³⁶ The draft resolution submitted by Chile and Argentina calling for an appointment of a subcommittee of 3 members to receive or to hear evidence, statements and testimony and to report to the Security Council, was put to the vote and received 9 votes in favor and 2 votes (Ukrainian S.S.R., U.S.S.R.) against. The President declared the draft resolution not adopted, "since the 2 votes in opposition included one of a permanent member."³⁷

C. Formosa Case

On September 30, 1950, during its 506th meeting, the Security Council discussed the complaint of armed invasion of Taiwan (Formosa) submitted by the Central People's Government of the People's Republic of China. An Ecuadorian draft resolution was before the Council to defer consideration of this question until after November 15, 1950, and to "invite a representative of the said government to attend the meetings of the Security Council held after November 15, 1950, during the discussion of that Government's declaration regarding an armed invasion of the Island of Taiwan" (Formosa).

The Council voted on the Ecuadorian draft resolution as a whole. Nationalist China, Cuba and the United States voted against. The President, Sir Gladwyn Jebb (U. K.), announced the result of the vote: "In my opinion the resolution is adopted. There were seven votes in favor, three against and one abstention."³⁸ The delegate of Nationalist China, Dr. Tsiang, immediately challenged "the opinion" of the President as a mistake, demanded that his negative vote should be considered as a veto, and invoked paragraph 2, Part II, of the San Francisco Declaration, as well as the precedents of the use of the double veto by the Soviet Union in the Czechoslovak question (303rd meeting, May 24, 1948), the Spanish question (49th meet-

³⁵ U.N. Doc. S/P.V. 303, p. 126. This declaration is omitted in the printed Official Records and the following statement in italics is to be found: "The President's ruling stood, the motion (*sic!*) for its rejection having failed to obtain the affirmative votes of seven members." (Security Council, 3rd Year, Official Records, No. 73, p. 27.) It remains nevertheless clear that a procedural vote pursuant to par. 2 of Art. 27 of the Charter was taken.

³⁶ U.N. Doc. S/P.V. 303, pp. 126-132.

³⁷ *Ibid.*, pp. 136-137. A good factual report on the Czechoslovak case is to be found in Yuen-li Liang's "Notes on Legal Questions concerning the United Nations," this JOURNAL, Vol. 43 (1949), pp. 134-144.

³⁸ U.N. Doc. S/P.V. 506, p. 12.

ing, June 26, 1946), and the Greek question (202nd meeting, September 15, 1947). An extensive discussion took place during this and the next meeting (507th meeting) in the afternoon. All delegates stressed the view that the proposed invitation was clearly procedural and no member had the right to change it arbitrarily into a matter of substance.³⁹ During the 507th meeting the President called for a vote on "whether it [the Security Council] regards the vote taken this morning on the Ecuadorian resolution as procedural." There were 9 votes in favor. Only China voted in the negative, and Cuba abstained. The President stated: "The proposal is therefore adopted; there were nine votes in favor, one against and one abstention."⁴⁰ Dr. Tsiang, after having quoted the pertinent passage of paragraph 2 of Part II of the San Francisco Statement, objected: "The vote just taken did not have the concurring vote of my delegation, and therefore the proposal that the matter is procedural was not adopted." The President ruled: "in the general interest of all of us . . . that, notwithstanding the objection of our Chinese colleague, the vote which the Council took this morning on the Ecuadorian resolution is procedural," because otherwise, "the whole functioning of the United Nations in the future" may well be impeded.⁴¹ Dr. Tsiang protested against what he called "the arbitrary ruling of the President" and suggested that an advisory opinion of the International Court of Justice be asked to settle the question. The President considered these remarks as a challenge to his ruling and asked those members who were in favor of overruling his decision to raise their hands. Nobody voted for overruling, nobody voted against, and nobody abstained. (*Sic.*) The President declared: "Since there is no vote in favor of overruling my decision, it stands."⁴² Dr. Tsiang declared that he did not participate in a vote which is in itself invalid and asked that it be recorded "that the President's action is arbitrary and that the decisions he has arrived at are illegal and therefore invalid." The President remarked that Dr. Tsiang's views did not seem to be shared by anybody else.⁴³

VOTE ON A PRESIDENTIAL RULING NOW ALWAYS PROCEDURAL

The most striking difference between the procedure followed on May 24, 1948 (B) and on September 29, 1950 (C) as compared with one applied by the Security Council on August 29, 1946 (A) is that the San Francisco Statement was *not* applied in cases (B) and (C) to the evaluation of the vote taken under Rule 30 (overruling of a Presidential ruling), in spite of the fact that the vote actually decided the "preliminary question as to

³⁹ *Ibid.*, pp. 12-55.

⁴⁰ U.N. Doc. S/P.V. 507, p. 17.

⁴¹ *Ibid.*, pp. 17-20.

⁴² *Ibid.*, pp. 21-26.

⁴³ *Ibid.*, pp. 26-30.

whether or not a matter is procedural." The vote of the Chinese delegate was not counted as representing a veto and the ruling of the President remained in force because the usual majority required in questions of procedure (7 votes of any members) was lacking. Thus a new and very important change in the Council's practice was introduced on May 24, 1948, with the acquiescence of all members of the Security Council.

Under the new practice (B) and (C) a regular majority (of at least 7 members of the Council casting their votes *against* the ruling) is necessary in order to overrule the President. No veto exists in such voting and there is no need to have a majority of at least 7 members voting *for* the President's ruling for the purpose of upholding it.

DOUBLE VETO LIMITED TO DOUBTFUL CASES ONLY

The practice adopted in the Formosa case goes much further than that. Paragraph 2 of Part II of the San Francisco Statement was *not* applied to the vote on the preliminary question itself, *i.e.*, a procedural vote was taken on the question whether the invitation to Communist China was a procedural matter. This radical departure from all previous precedents on the double veto was based on the opinion that, pursuant to the recommendations of the General Assembly resolution of April 14, 1949, No. 267 (III), the double veto does not apply when there is no reasonable doubt that the decision voted upon falls within one of the 35 categories of decisions listed in its annex as being procedural, and that the invitation, under Rule 39 of the rules of procedure of the Security Council, was one of them.

The United States delegate (Gross) declared in this connection:

Part II, paragraph 2 of the San Francisco Statement was never intended, and cannot properly be construed, to give the five permanent members of the Security Council the right to use the device of the double veto to determine unilaterally to be non-procedural, matters which the Charter provides, or which were agreed in part I of the San Francisco Statement, as procedural.⁴⁴ . . . In the present state of the world, it is not difficult to see that the unlimited power of the veto and the double veto in the Security Council would be dangerous to security.⁴⁵

The President (Jebb), speaking as the British delegate, associated himself "fully and immediately" with the American statement, calling it "at once heartening and inspiring" and "*auspicium melioris aevi*."⁴⁶ The Soviet delegate tacitly approved the procedure and, only in connection with the declaration of the United States delegate, reserved the right of his delegation to express its views after having it studied.⁴⁷

⁴⁴ *Ibid.*, p. 32.

⁴⁵ *Ibid.*, pp. 33-35.

⁴⁶ *Ibid.*, pp. 36-40.

⁴⁷ *Ibid.*, p. 51.

Thus the double veto would remain only if and when a reasonable doubt exists whether the matter is procedural or not. The existence of such a doubt shall be judged in the light of provisions of the Charter on procedure, the Council's rules of procedure, Part I of the San Francisco Declaration, precedents in the Council's practice and the General Assembly resolution of April 14, 1949.

The old practice assumed that it is enough for the use of the double veto when a permanent member stresses his opinion that a matter to be voted on is not of a procedural character and gives his reasons. The new Formosa precedent virtually requires in addition that the regular majority of the Council share his views. It may therefore properly be said that the Council may, by a *procedural* vote of seven of its members (including therefore at least one permanent member), decide that the double veto does not apply to the matter under consideration, thus *denying to a permanent member the exercise of the veto*. (It becomes apparent that, if all five permanent members are unanimous that a matter is non-procedural, the non-permanent members alone cannot turn it into a procedural one.) It goes without saying that such a denial must be based on firm legal and political grounds. The unlimited anarchical right of the double veto was restricted to its proper place and put under the control of the Council's majority.

PRESIDENTIAL RULING ON PRELIMINARY QUESTION

The comparison of the above-described cases shows another eloquent difference. During the consideration of the application of Albania the President ruled, after contradictory opinions were expressed by members of the Council, on the "preliminary question" whether the U. S. motion was procedural, submitted his ruling to the vote, evaluated the result of the vote pursuant to the San Francisco Declaration, and asked to consider his statement evaluating the result of the vote as another ruling open to challenge. The San Francisco Declaration speaks however of a "*decision . . . to be taken as to whether a procedural vote would apply*" and of a "*decision regarding the preliminary question as to whether or not such a matter is procedural,*" and not of a ruling. Therefore the practice followed in the Czechoslovak case seems the only correct procedure. After all, the "preliminary question" can hardly be considered to be a "point of order."⁴⁸ The "preliminary question" was decided by the Council itself without a ruling of the President and only the statement of the President about the result of the vote was treated as a ruling on a point of order.

In the Formosa case the President, after having announced the result of

⁴⁸ Report of the Special Committee on Methods and Procedures [of the General Assembly] (U.N. Doc. A/937, Aug. 12, 1949, p. 30), tries to define what may be a valid point of order. See footnote 18 above.

the vote on the preliminary question,⁴⁹ in view of the dissent of the Nationalist Chinese delegate, made a ruling, not about the result of the vote, but on the "preliminary question" itself.⁵⁰ It was preferable to follow the Czechoslovak and Greek precedents⁵¹ and to rule the resolution adopted. It would not have affected the outcome of the proceeding and would have considerably weakened Dr. Tsiang's arguments against the President's ruling.

PRESIDENTIAL APPRAISAL OF THE RESULT OF THE VOTE AS A RULING

The question arises whether the statement of the President interpreting the result of the vote may be considered as a point of order under Rule 30 or not. The delegate of the U.S.S.R. tried to deny it,⁵² whereas the French representative acting as President took the opposite view.⁵³ It seems impossible to question seriously the opinion that the statement of the President construing the result of a vote just taken is part of his functions of conducting the proceedings of the Council and applying the rules of procedure, and as such represents a point of order every member of the Council may raise. Otherwise the members of the Council would be quite powerless against possible open abuse of his powers by the President. The requirement of a majority of members voting *against* the presidential ruling in order to have it annulled endows the rulings of the President already with an exceptionally strong position as compared with motions and draft resolutions of any kind introduced by members of the Council, a power quite sufficient to enable him to conduct the Council proceedings. The finality of his interpretation of a vote of the Council would give him dangerous arbitrary powers nobody intended to give him.

OVERRULING OF THE PRESIDENTIAL RULING BY THE COUNCIL

An interesting point appears from the foregoing comparison of cases. Under the old practice which applied the San Francisco Statement to the vote under Rule 30 when the "preliminary question" was involved, the content of the President's ruling was of paramount importance, always when, as usual, the great Powers were in disagreement. The President (Lange, Poland) ruled on August 29, 1946,⁵⁴ the American motion being

⁴⁹ "The proposal is therefore adopted" (U.N. Doc. S/P.V. 507, p. 17).

⁵⁰ "... notwithstanding the objection of our Chinese colleague the vote which the Council took this morning on the Ecuadorian resolution is procedural" (U.N. Doc. S/P.V. 507, pp. 18-20).


⁵¹ Czechoslovakia, 303rd meeting, Security Council, 3rd Year, Official Records, No. 73, pp. 21, 26, 27; Greece, 202nd meeting, Security Council, 2nd Year, Official Records, No. 89, p. 2400.

⁵² U.N. Docs. S/P.V. 202, pp. 132, 146, S/P.V. 303, pp. 101-105.

⁵³ U.N. Doc. S/P.V. 303, p. 106.

⁵⁴ 57th meeting, Security Council, 1st Year, Official Records, 2nd Ser., No. 5, pp. 125-127.

one of procedure. Four permanent members voted against, and under the San Francisco Statement overruled the President. The United States, however, voted in favor of the ruling. Therefore, in case the President had ruled that the United States' motion was one of substance, he would have been obliged to consider the vote of the United States' representative cast against his ruling as a veto pursuant to the San Francisco Declaration, and declare the American motion as procedural. Analogously in the Czechoslovak question, if the San Francisco Declaration had been applied to the vote taken under Rule 30 on the President's evaluation of the vote on the "preliminary question," both theoretically possible rulings of the President, *i.e.*, that the Chilean resolution was procedural as well as one of substance, would have been overruled—the first one by a Soviet veto and the second by a Chinese veto. Therefore the choice of one possibility by the President when stating his ruling decided in fact the result of the subsequent vote of the Security Council not only on the "preliminary question," but actually on the decision to be taken on the problem itself, be it the admission of Albania to the United Nations or the *coup* in Czechoslovakia in February, 1948. Such paradoxical results followed from the principle of the unanimity of the permanent members of the Security Council, always when such unanimity did not exist, that is, on the most important matters of international politics. No one can therefore wonder that one of the delegates representing a permanent member in this connection once stated privately: "That is the stupidity of the veto."



TWO PROCEDURES IN THE SECURITY COUNCIL

The Formosa precedent is based on the General Assembly resolution of April 14, 1949. That recommendation as a work of the Interim Committee is completely ignored by the Soviet Union and its satellites who voted against its adoption. It must therefore be anticipated that the Soviet or a like-minded delegate acting as the Council's chairman will adhere to his own concept of the unlimited double veto. The Security Council would thus follow two different procedures at different periods, a not very edifying demonstration of the rule of law in an international organization.

POSSIBILITY OF LIMITATION OF THE VETO PRIVILEGE ITSELF

The practice established in the Czechoslovak case and confirmed and extended in the Formosa case, which consists in always applying a procedural vote when a ruling of the President is challenged, also when the "preliminary question" whether or not a resolution is of a procedural character is involved, has an overlooked and almost revolutionary result. It opens the door to the limitation of the scope of the veto privilege itself. A theoretical, but under the prevailing circumstances quite probable, scheme would be as follows: A dispute arises in the Security Council whether a

draft resolution unpleasant or unacceptable to one of the permanent members is procedural or of substance in spite of the fact that the matter is *not* covered by any of the 35 categories of decisions listed in the annex to the General Assembly's resolution of April 14, 1949. The question is submitted to the Council's decision, and the vote is: 7 members for considering the draft resolution as procedural, 1 (permanent member) against, and 3 abstentions. The President applies the San Francisco Statement (Czechoslovak precedent) and announces that in view of the dissenting vote of a permanent member, the draft resolution should be considered as one of substance. This statement is challenged by one or several members and a vote under Rule 30 is taken. Seven members (therefore, in view of the composition of the Council, obviously at least one permanent member too) vote against the ruling concerning the result of the vote and, the President being overruled, a procedural vote applies to the draft resolution in question despite the veto cast by a permanent member on the "preliminary question." The same result might be obtained in the procedure followed in the Albanian case described above under A, by putting the first presidential ruling, after it has been challenged, to a procedural vote under Rule 30.

The new practice may lead even further. Let us consider the following hypothetical case: The "preliminary question" was not raised at all before the vote was taken on a resolution because the contents of the draft resolution were previously considered a matter of substance. The result of the vote is the same as in the theoretical example described above (7 in favor, 1 permanent member against, and 3 abstentions). After the President has announced the result of the vote, declaring that due to a negative vote cast by a permanent member the resolution is not adopted (Czechoslovak precedent), some members challenge this declaration as a ruling, the ruling is put to the vote pursuant to Rule 30, and seven members vote against the ruling. The result is that in spite of the negative vote of a permanent member the resolution nevertheless is adopted. Obviously the challenging members must base their argument on the contention that the draft resolution is one of procedure.

¶ Thus at least a theoretical possibility exists that in contravention of the law of the Charter the new practice may be used in order to restrict by a regular majority vote the very field of the veto privilege by transferring non-procedural matters such as recommendations for admission of new members, recommendations for appointment of the Secretary General or recommendations under Chapter VI (Pacific Settlement of Disputes) to the realm of procedural matters. Such a limitation of the veto privilege is without any doubt highly desirable, but should not be attempted through incorrect application of technical procedural devices. If it is considered politically wise to preserve the present composition of the United Nations, the new practice concerning the double veto cannot be extended to non-procedural

questions of vital importance to any of the great Powers. Procedure after all represents in international relations politics in disguise and encounters a firm and insuperable barrier in hard facts of power politics. //

CONCLUSION

The Czechoslovak and Formosa precedents have established the Security Council's regular majority of any seven members as the final judge deciding whether the right to exercise the veto privilege applies to a particular matter. By invoking as a yardstick the list of procedural decisions annexed to the General Assembly's resolution of April 14, 1949, the door was practically closed to further abuses of the double veto. In view of the Soviet non-acceptance of that resolution, the probability exists that Soviet delegates acting as the Council's presidents will follow the old practice based on the unlimited scope of the double veto. The Czechoslovak and Formosa precedents open up the theoretical possibility of restricting the area of the veto privilege itself. However, such a use of the new practice would be of doubtful legal correctness.

THE NEW GENEVA CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS

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THE ORIGIN OF THE NEW CONVENTIONS

The Geneva Conventions are the basis on which rest the rules of international law for the protection of the victims of armed conflicts.)

The International Committee of the Red Cross¹ founded in 1863 the Red Cross organization, whose headquarters have remained at Geneva; it has by tradition the duty of watching over the application of the conventions. In peacetime its constant endeavor is to ensure better protection, under international law, of the individual against the rigors of war. From its inception in 1863 the Committee has been the executive agent of the Geneva Convention for the Protection of Wounded Combatants, and of the humanitarian conventions related to this fundamental agreement. These basic treaties are all founded on respect for the individual and for his dignity; they embody the principle of selfless relief, without discrimination, to all human beings in distress whether they be wounded, prisoners of war or shipwrecked, and thus defenseless and no longer to be regarded as enemies.

Since the year 1863 international law has gradually extended its protection to fresh categories of war victims, as the technique of warfare was perfected; at the same time the Red Cross has given them increasing succor and the benefit of its humanitarian service. As the evils of war involved greater masses of people, so did the humanitarian effort address itself to an ever-increasing number; thus the wounded on the battlefield, sick combatants, the dead, the war-disabled, shipwrecked seamen, civilian internees and lastly, civilians in general who were menaced by the effects of war, progressively became the care of the Red Cross. The law, however, always lags behind charity; it is tardy in conforming with life's realities and the needs of mankind. There can hardly be a nobler undertaking than to

¹ The International Committee, the direct successor of the Committee of Five (Dunant, Dufour, Moynier, Appia and Maunoir) who founded the Red Cross, comprises twenty-five Swiss citizens at most, who are elected by co-optation. In time of war the Committee acts as a neutral and independent intermediary between belligerents. During the recent war the Committee directed large-scale relief activities. The following figures will give some idea of the scope of its work: more than four thousand enrolled assistants; eleven thousand visits paid to prisoners of war camps; twenty-five million civilian postal messages dispatched; relief valued at three thousand million Swiss francs forwarded to prisoners of war alone.

hasten its progress, to win this race against time—even, perhaps, by bold and judicious anticipations, to outdistance the present.

Through many long years the International Committee has steadily widened the scope of the humanitarian conventions, adapting them to the requirements of the hour, or drafting new agreements. The work first arose out of a simple tradition; its development came through the mandates of International Red Cross Conferences² and successive diplomatic conferences.³

The Committee's main achievement between the two World Wars was to establish new conventions, in particular the Convention relating to the Treatment of Prisoners of War, which was signed in 1929,⁴ and which proved the safeguard of millions of prisoners during the years 1939–1945 and after.⁵ Further drafts, amended or established by the Committee, were due for ratification by a diplomatic conference, convened by the Swiss Federal Council for the beginning of 1940. The outbreak of war most unhappily prevented this meeting.

In 1945, at the conclusion of a war without precedent, the complex and vital task had to be faced of completing and amending the rules of international law in the humanitarian field, in the light of experience gathered during hostilities. Admittedly, such an undertaking rests upon the pessimistic notion that war is always possible. Why, it is sometimes asked, this laborious preparation of conventions that can be implemented only in the event of hostilities, whereas every endeavor is now being made to abolish war? It has even been maintained that the Red Cross is not adverse to the idea of war. There are three obvious answers to these critics:

(1) The same views were put forward in 1919—as they had been in 1863–1864—but subsequent events amply justified the Committee's foresight, which might now reply that so long as states maintain powerful armies, they obviously do not rule out the possibility of war breaking out once more.

² The International Red Cross Conference is attended by representatives of the national and international Red Cross institutions and of governments; it is the supreme legislative authority of the Red Cross. It is convened, in principle, every four years. Such conferences have taken place in Geneva (1864), Paris (1867), Berlin (1869), Geneva (1884), Karlsruhe (1887), Rome (1892), Vienna (1897), St. Petersburg (1902), London (1907), Washington (1912), Geneva (1921, 1923, 1925), The Hague (1928), Brussels (1930), Tokyo (1934), London (1938), Stockholm (1948). The Minutes of the International Red Cross Conferences are as a rule issued in French by the Red Cross society of the country in which the meeting is held.

³ A diplomatic conference is a meeting of representatives of states empowered to conclude an international convention.

⁴ U. S. Treaty Series, No. 846; this JOURNAL, Supp., Vol. 27 (1933), p. 59.

⁵ See Report of the International Committee of the Red Cross on its Activities during the Second World War (September 1, 1939–June 30, 1947) (3 vols., Geneva, May, 1948, pp. 736, 320, 539, in English, French and Spanish). Further reports on the International Committee for the period July 1, 1947–Dec. 31, 1948, and the year 1949 have appeared.

✱ (2) The Red Cross would fail in its duty if it were not ready at all times to cope with the worst contingencies, however improbable they may be—which does not preclude the ardent hope that they may never come to pass.

(3) The Geneva Convention is one of the shrewdest blows ever struck at war, and the foundation of the Red Cross was nothing less than the condemnation of useless slaughter.

Other critics may say, however, that modern inventions and, particularly, the use of atomic energy hardly leave room for international juridical control. The question also arises whether it will be possible to prevent the killing of noncombatants, civilians, prisoners of war, and the destruction of hospitals and similar institutions. We can offer no solution of this problem; indeed, there is every reason for anxiety in view of the discrepancy between the material and the moral progress of our civilization. The future of the world being thus uncertain, it is the duty of the Red Cross to assist in widening the scope of law, on the assumption that the most favorable circumstances will prevail—in other words, that law will retain its value.

On February 15, 1945, even before firing had ceased in the Western Hemisphere, the International Committee informed governments and national Red Cross societies of the world of its intention to undertake the revision of the conventions and the conclusion of new humanitarian agreements, as it had done after the Armistice of November, 1918. The Committee considered it to be its duty to bring to this task the experience gained in the course of its world-wide activities and assembled in its extensive records. The suggestion was welcomed by the states and Red cross societies, and the Committee at once set to work. For over four years this task has been its chief endeavor and care.

With this end in view, the Committee had recourse to methods similar to those employed after the first World War. After assembling the fullest possible data and settling upon those aspects of international law that required confirmation, completion or amendment, the Committee, acting in co-operation with experts of various countries, established the texts of revised and new conventions, to be submitted to the International Red Cross Conference of 1948 and finally, to a diplomatic conference of government delegates.

The working data to be assembled came from many sources. In the first place, there was the very abundant information collected by the Committee and its delegates during the war all over the world, and which merely required to be systematized. A further source was the information in the hands of governments and national Red Cross societies of former belligerent countries, and, finally, that in the hands of neutral countries, especially those which had acted as Protecting Powers.⁶ Mention should also be made of

⁶ A Protecting Power is a neutral country which undertakes, in time of war, to look after the interests of a belligerent in an enemy country. In the course of their duties

the data supplied by many national and international relief organizations whether denominational or secular, which had carried out valuable relief work side by side with the Red Cross. Finally, individuals, former prisoners of war, camp doctors and spokesmen⁷ are frequently in a position to supply valuable information or advice.

The International Committee clearly required the effective assistance of all these agencies, especially of governments and national Red Cross societies of all countries. For this reason, the Committee turned to these various bodies on February 15, 1945, recommending that they should gather all useful data, classify them and prepare summaries. This invitation provoked immediate response. Government organizations, Red Cross societies and other bodies began work with commendable promptness. They assembled data, gave an account of their experiences, and put forward suggestions. In many countries work was thus carried out along the same lines and in the same spirit as in Geneva. With such ready assistance, it was impossible to fail, even under the weight of so heavy a task.

We have alluded to the Commissions of Experts convened by the International Committee. The first of these had a limited scope and met in Geneva in October, 1945; it comprised the neutral members⁸ of the "Mixed Medical Commissions," whose duty it was during the war to examine sick or wounded prisoners and to make decisions regarding their eligibility for repatriation. This meeting revised the treaty clauses relative to the repatriation of invalid prisoners and to their accommodation in neutral countries. The meeting also drew up an amended Draft Agreement on this subject.

The second Commission of Experts was the "Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of various Problems relative to the Red Cross." This was convened by the International Committee in Geneva and sat from July 26 to August 3, 1946; it studied the Committee's proposals and preliminary drafts. The meeting was attended by 145 delegates representing 50 countries.

the Protecting Powers carry out welfare work which is often similar to that of the International Committee, since it comprises in particular the visiting of prisoner-of-war camps. During the second World War, Switzerland played a very important part as a Protecting Power.

⁷ Prisoners of war are authorized to appoint representatives or spokesmen to act on their behalf with the authorities, to receive and allocate and distribute collective relief consignments and so forth.

⁸ Those members, at least, who were in Switzerland. The 1929 Prisoners of War Convention instituted the said Commissions, each to consist of two neutral medical practitioners and one belonging to the Detained Power. On the basis of a schedule of diseases and wounds included in the Model Draft Agreement annexed to the Convention, the Mixed Medical Commissions decide whether prisoners are eligible for repatriation. The neutral members of these Commissions are appointed by the International Committee or by the Swiss Government; during the war, they were nearly all of Swiss nationality.

Having thus learned the views of the Red Cross societies on the matters with which they are particularly concerned, the International Committee devoted the following months to careful scrutiny and summarized the data relative to all the treaty stipulations to be established. In March, 1947, the Committee consulted the representatives of denominational and secular organizations which had, in co-operation with the Red Cross, provided intellectual or spiritual aid to prisoners of war, civilian internees and other war victims.

From April 14 to 26, 1947, a "Conference of Government Experts for the Study of the Conventions for the Protection of War Victims" sat in Geneva. This was attended by 70 official representatives of fifteen countries which, during the war, had detained or lost large numbers of prisoners of war and civilian internees, and thus had first-hand knowledge of the matters under discussion. Having considered the Committee's suggestions, the views expressed by the national Red Cross societies, and the drafts submitted by several governments, the Conference adopted amendments to the existing Geneva Conventions and established a preliminary Draft Convention for the Protection of Civilians in Time of War.⁹

The opinions of governments unable to attend the April conference were also heard. Several of them sent qualified representatives to Geneva, where they discussed matters with the International Committee from June 9 to 12, 1947. Subsequently, the proposed drafts were submitted by the Committee to a special Commission of National Red Cross Societies which sat in Geneva on September 15 and 16, 1947. This body approved the drafts as a whole, but made a certain number of suggestions which were taken into account.

For certain particular aspects of their work, the Committee also consulted major social organizations, such as the International Union for Child Welfare, the International Committee for Military Medicine and Pharmacy, and the International Labor Office.

Early in 1948, the International Committee completed the Draft Conventions and issued them in May, in the shape of a quarto volume of some 250 printed pages,¹⁰ to all governments and national Red Cross societies, with a view to their discussion and approval by the Seventeenth International Red Cross Conference. Owing to the importance and complexity of the subject the Committee had reserved the right of amendment until the drafts were submitted to a diplomatic conference, and of introducing such changes as further constant study might show to be necessary.

⁹ See Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims (Geneva, April 14-26, 1947) (Geneva: International Committee of the Red Cross, 1947, pp. 332).

¹⁰ Draft Revised or New Conventions for the Protection of War Victims (Geneva: International Committee of the Red Cross, 1948, pp. 245).

The Seventeenth International Red Cross Conference met in Stockholm from August 20 to 30, 1948; it was attended by the representatives of 50 governments and 52 national Red Cross societies. Subject to a few amendments, the meeting adopted the Draft Conventions submitted by the Committee. Further, the Conference expressed the opinion that these drafts, in particular the new Convention relative to the Protection of Civilians, fulfilled the ardent hopes of the peoples of the world, and that they embodied the essential protective regulations to which every human being is entitled. The Conference also drew the earnest attention of governments to the urgent need of ensuring the effective protection of civilians in time of war by a convention, the absence of which had such disastrous results during the recent conflict. Likewise, all states were invited to implement its provisions, if necessary without awaiting ratification, and to meet as soon as possible in diplomatic conference for the adoption and signature of the text now approved.¹¹

Having passed through the long series of processes {we have outlined} the drafts were taken as sole working documents by the "Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of the War," convened by the Swiss Federal Council, as trustee of the Geneva Conventions, and which met in Geneva from April 21 to August 12, 1949.

Of the sixty-three governments represented at the Conference, fifty-nine had full voting powers while four attended as observers. It is to be noted that the Union of Soviet Socialist Republics, which did not attend the Stockholm Conference, took an active part in the work of the Geneva Conference, as did also the peoples' democratic republics of Eastern Europe.

Representatives of the International Committee of the Red Cross were invited to collaborate with the Commissions of the Conference in the drafting of texts.

After four months of continuing and exhaustive debate, the Conference established the four following Conventions: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of August 12, 1949; (2) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of August 12, 1949; (3) Geneva Convention relative to the Treatment of Prisoners of War, of August 12, 1949; (4) Geneva

¹¹ See Revised and New Draft Conventions for the Protection of War Victims. Texts approved and amended by the XVIIth International Red Cross Conference (Revised Translation). (Geneva: International Committee of the Red Cross, 1948, pp. 171); Remarks and Proposals submitted by the International Committee of the Red Cross. Document for the consideration of Governments invited by the Swiss Federal Council to attend the Diplomatic Conference at Geneva (April 21, 1949) (Geneva: International Committee of the Red Cross, February, 1949, pp. 95).

Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949.¹²

When the six-month period allowed for signing the Conventions expired on February 12, 1950, they had been signed by 61 states, including China, France, Great Britain, the United States and the U.S.S.R.

Certain signatures were accompanied by reservations made on specific clauses. The reservations for the most part refer to points of detail. It is to be hoped, nevertheless, that they will not be maintained when ratification takes place, because their effect may be to complicate the implementing of the Conventions.

THE GENERAL SENSE OF THE NEW CONVENTIONS

What is the substance of these new Geneva Conventions and how far do they introduce amendment into existing international law? Our attempt to answer this question can only deal with salient points. For the sake of clarity the subject has been divided under different headings: (1) General Questions common to the Four Conventions; (2) First and Second Conventions (Sick, Wounded and Shipwrecked Combatants); (3) Third Geneva Convention (Prisoners of War); (4) Fourth Geneva Convention (Civilians).

1. *General Questions common to the Four Conventions*

One of the most important amendments to existing conventions was that their stipulations should be applicable not only in the case of international war formally declared, but also on the outbreak of *de facto* hostilities, even if war has not been previously declared, and irrespective of the nature of the armed conflict. It is inadmissible that a state should be entitled to disregard treaty stipulations simply by opening hostilities without previous notification to the adversary, or by giving such proceedings any other name. It was further highly desirable that the Geneva Conventions should be applicable also in case of civil war. Many difficulties have arisen in this connection, owing to the fact that the conventions are signed by states as such, and are only binding between signatories, whereas in the event of civil war, one of the parties concerned is usually not a recognized belligerent.

¹² The French and English texts (both versions are equally authentic) adopted by the Geneva Diplomatic Conference on Aug. 12, 1949, have been printed and circulated to the signatory governments by the Swiss Federal Government. The same authority is issuing translations into Spanish and Russian under Article 55 of the First Convention. The following reprint of the four conventions has been issued by the International Committee: *The Geneva Conventions of Aug. 12, 1949* (Geneva: International Committee of the Red Cross, 1949, pp. 249, 5 Swiss Fr.). The text of the Conventions has also been published in U. S. Dept. of State Pub. No. 3938 (General Foreign Policy Series 34, Aug. 1950, \$1.00). The Final Record of the Geneva Diplomatic Conference of 1949 (3 vols.) is in course of publication by the Swiss Federal Government.

The new conventions do not go as far as the Stockholm drafts, which proposed that the conventions should make specific provision for civil war as well as for war between states. But they provide at least that in conflicts which are not international in character there shall be minimum safeguards for "persons taking no active part in the hostilities," such persons "shall in all circumstances be treated humanely": an impartial humanitarian body, such as the International Committee of the Red Cross, may intervene in their behalf; finally, "the Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions" of the conventions.

During the second World War certain belligerent prisoners of war were deprived of the protection of the conventions. These belligerents asserted that the conventions were no longer applicable in consequence of occupation or capitulation, or else they concluded special agreements with the governments of occupied states or with the prisoners themselves. Means must be found to prevent such infringements of treaty stipulations. It is now provided that the conventions shall be applicable to all prisoners, without discrimination, until they are finally released or repatriated, thus even after the close of hostilities. It is also stipulated that the prisoners may not be constrained to abandon the rights to which they are entitled.

The supervision of the proper implementing of the conventions mainly depends on action taken by the Protecting Powers. During the recent conflict, however, many war victims had no Power entitled to defend their interests. The revised texts now provide that, in such cases, belligerents shall be under the obligation to make up for this lack of protection by inviting either a neutral state or an impartial welfare agency, which they are at all times free to select, to assume on behalf of these persons in enemy hands the duties normally devolving on a Protecting Power.

Should such measures prove, however, inadequate, it is provided that the Detaining Power shall apply to the International Committee of the Red Cross, or some other international organization qualified to assume the strictly humanitarian tasks—and only these—which are normally the responsibility of the Protecting Power.

It is not enough to enact appropriate legislation; it must be effectively applied and respected; any infringements must be clearly recognized and their authors duly punished; furthermore, any such breaches must be discontinued. This raises the difficult question of sanctions. What may be termed "Red Cross law" is weakened by the fact that it is part and parcel of the laws and customs of warfare. In time of war, legal stipulations—especially today, when warfare is particularly ruthless—are liable to be wholly disregarded. There is one factor, however, which tends to make up for this deficiency and which is inherent in Red Cross laws: the interests

involved are not of an economic order, but of the highest moral significance—they concern the protection of the life and dignity of human beings.

Until recently, the conventions made practically no reference to sanctions. Only the Geneva Convention proper contained a fleeting allusion to the possibility of an enquiry, after agreement between the belligerents concerned. Today, the revised conventions stipulate that the states shall make their legislation adequate for the repression of all serious breaches of the conventions, and the breaches are defined. The persons responsible shall be sought for and handed over for trial by their own courts, or by those of another Contracting Party interested in the prosecution.

There is no room for doubt but that these texts are an important contribution to the treatment of "war crimes" in international law—an idea which although much spoken of and written about, still awaits a generally acceptable legal definition.

2. *First and Second Geneva Conventions (Sick, Wounded and Shipwrecked Combatants)*

The "Geneva Convention" for the Relief of Sick and Wounded Combatants was concluded in 1864; it was the first great victory of the Red Cross over war. This great innovation in international law was revised in 1906 and 1929. The Convention chiefly provides that wounded and sick combatants shall be protected and cared for, without distinction of nationality; the ambulance and military hospitals, personnel and equipment shall be given special protection. The red cross on a white ground was adopted as the distinctive emblem of immunity.¹³

It is the revised version of this Convention which becomes the First Geneva Convention of August 12, 1949.

The Tenth Hague Convention of 1907 adapted the principles of the Geneva Convention to maritime warfare. The revised text of this convention becomes the Second Geneva Convention of 1949. Its special aspects, which refer to shipwrecked combatants, need not detain us here.

Article 5 of the Geneva Convention of 1929 stipulates that military authorities may call upon the "charitable zeal" of the civilian population to collect and nurse, under their direction, all wounded and sick combatants;

¹³ For texts of early conventions see *Recueil général des lois et coutumes de la guerre terrestre, maritime, sous-marine et aérienne, d'après les Actes élaborés par les Conférences internationales depuis 1856. Documents recueillis et annotés par M. Marcel Deltenre* (Bruxelles: 1943, pp. 885, in French, Dutch, German and English); *Manuel de la Croix-Rouge internationale. Conventions—Statuts et règlements. Résolutions des Conférences internationales et des Assemblées de la Ligue* (Geneva: Comité international de la Croix-Rouge, Ligue des Sociétés de la Croix-Rouge, 1942, 8th ed., pp. 561, in French only). A ninth edition, which will appear also in English and Spanish, is in preparation. See also *The Hague Conventions and Declarations of 1899 and 1907* (James Brown Scott, ed., New York: Carnegie Endowment for International Peace, 1925, pp. 303).

the authorities may also grant persons who have responded to this appeal special protection and certain facilities. An interesting addition to this rule now stipulates that the military command must allow the population and the relief associations to volunteer in collecting wounded or sick combatants, whatever their nationality. -In this manner no army or occupying Power can prevent the population from carrying out the humanitarian duty of helping all wounded, even should they belong to enemy parachute forces..

A matter which has often been raised of late and which has given rise to lively discussion, is the status of medical personnel. The experience of the second World War has taught the need of providing for the retention of part of the medical personnel fallen into enemy hands, for the purpose of nursing sick prisoners of war. -During the Conference of Government Experts, two opinions were mooted. Some delegates thought that all medical personnel taken prisoner should be assimilated to prisoners of war; others upheld the traditional immunity of hospital personnel and their right to repatriation; while they should be retained in exceptional cases only.

After thorough study, a compromise was adopted, calculated to protect the interests of both prisoners of war and wounded: henceforth, doctors, chaplains and medical orderlies shall not be considered as prisoners of war, but shall have, as a minimum, the benefit of all provisions which are advantageous to them of the 1949 Third (Prisoners of War) Convention. They shall be held in captivity only insofar as the state of health, the moral needs and the number of prisoners demand; otherwise they shall be repatriated.

Hitherto, the Geneva Conventions have dealt chiefly with war victims under Red Cross protection, and with the red cross as a distinctive emblem; very few references are made to the Red Cross in its capacity as a relief agency. For instance, the national Red Cross societies were not mentioned as such; the International Committee was given no legal authority to make use of the Red Cross emblem, which they themselves had introduced.

These gaps are now filled, thanks to the new texts, and the national and international Red Cross organizations have more solid foundations for their future relief work. Reasonable limits are, however, set to avoid the contrary extreme, which would be to sap the strength which the Red Cross derives from its flexible organization, its power of initiative and its non-official character.

3. *Third Geneva Convention (Treatment of Prisoners of War)*

The 1929 Prisoners of War Convention, concluded at Geneva on the initiative of the International Committee, is a detailed code of some 97 articles. It was signed by 47 states and governed the fate of millions of prisoners during the second World War. Despite its gaps and the ambiguous nature of a few clauses, and although it was not fully implemented

by certain states, it may be said that this convention has proved its value and ensured an average treatment of prisoners which was apparently better than in 1914-1918.¹⁴

The first point in doubt was the exact category of persons to whom the protection guaranteed by this convention should be extended. Such a definition was needed in order to settle the grave problem of the treatment of "partisans" falling into enemy hands. The solution now adopted is to put organized resistance movements on the same footing as militia and volunteer corps who, without forming part of the regular armed forces of the belligerent, depend nevertheless on him and fulfil the conditions laid down in the Hague Regulations, namely:

- (1) that these persons act under the orders of a responsible commander;
- (2) that they constantly wear a fixed distinctive emblem, recognizable at a distance;
- (3) that they carry arms openly;
- (4) that they act in obedience to the laws and customs of warfare and treat captured enemies according to the provisions of the Convention.

Although this formula has reconciled opinions that were hitherto contradictory, the fact remains that the conditions laid down, and which the Committee consider necessary, would have robbed of treaty protection most of the resistance movements that were formed during the recent war.

Provision has also been made whereby prisoners of war may not be transferred by the Detaining Power to any Power not party to the convention. Should the Detaining Power transfer prisoners to another Contracting Party, it must be sure that the latter is willing and able to implement the convention. Should the second Power fail in its obligations, the Power transferring the prisoners must take the measures necessary to rectify this situation, or even bring the prisoners back to its own territory.

The 1929 Convention stipulated that prisoners' food rations should be equivalent to those issued to the "depot troops" of the Detaining Power. In the Far East, however, where the people are accustomed to a very frugal diet, the rations of base forces were quite inadequate for white men, who are used to more substantial fare. Was it perhaps preferable to determine prisoners' daily food rations according to a fixed calorific content? Certain states might be unwilling that prisoners in their hands should be better fed than the civilian population, which is often subjected to severe food rationing. The Geneva Conference preferred another and more adaptable solution, namely, that basic rations must be of sufficient quantity, quality and

¹⁴ See Herbert C. Fooks, *Prisoners of War* (Federalburg, Md.: Stowell Printing Co., 1924, pp. 456); Gustav Rasmussen, *Code des Prisonniers de guerre. Commentaire de la Convention du 27 juillet 1929* (Copenhagen: Levin & Munksgaard, 1931, pp. 147); William E. S. Flory, *Prisoners of War. A Study in the Development of International Law* (Washington: American Council on Public Affairs, 1942, pp. 199).

variety to maintain the men in good health, and to prevent loss of weight or nutritional deficiencies.

With regard to the labor performed by prisoners of war, the 1929 Convention merely stipulated that it should have no direct connection with the operations of war. It is extremely difficult, however, to determine whether labor is permissible or not, by applying the sole criterion of its relation with military operations. A more concrete solution was adopted in 1949, namely, a limitative enumeration of the categories of work on which prisoners might be employed. Special mention was made of the removal of mines, which is prohibited unless prisoners volunteer themselves for the work.

In view of monetary differences between countries and fluctuations in exchange, it was decided to base pay and wages on the Swiss franc as the standard.

Turning to judicial proceedings, we notice that the 1929 Conventions made no reference whatever to any punishment for acts committed by prisoners prior to their capture. The International Committee of the Red Cross had deduced from this that prisoners, even when found guilty, should continue to have the benefit of the convention, *i.e.*, whatever the gravity of the offense. This point has been clarified and Article 85 of the Third Convention now formally recognizes this right.

4. *Fourth Geneva Convention (Protection of Civilians)*

The establishment of a new Convention for the Protection of Civilians in Wartime was an imperative necessity. After the bitter experiences of the last conflict and the horrors of the concentration camps, there was no need to stress the urgency and capital importance of international rules in this particular field.

This preoccupation dominated the legal work of the International Committee. The Draft Convention for the Protection of Civilians which they submitted in 1934, had not, however, been signed when war broke out in 1939. At that time, the states confined themselves to assimilating to prisoners of war the civilians resident in enemy territory at the outbreak of hostilities, but did not consent to extend the protection to the civilian population in occupied countries.

Today, there exists a new convention as detailed as that for prisoners of war; it has been signed and its object is to prevent a repetition of the tragic events of the second World War.

The first part of the convention deals with the general protection of populations against effects of warfare. It includes, first, the establishment of safety zones to shelter the wounded, the sick, children and young mothers and the aged. This chapter also extends the most important stipulations of the Geneva Convention to wounded and sick civilians. Civilian hospitals, recognized as such by the state, may be marked with a red cross on a white ground.

It is generally known that the First Geneva Convention applied only to wounded and sick military personnel. For many years past, however, it has been admitted that the civilian population, as well as civilian hospitals and staff, are all in need of protection. Professor Max Huber, Honorary President of the International Committee, summarized the situation in the following words:

In practice, the distinction between combatants and non-combatants cannot be upheld in the face of human distress. War, as it becomes more and more total, practically annuls the difference as to injury and exposure to danger which formerly existed between armed forces and non-combatants.¹⁵

Under the new convention signatories shall authorize the free passage of medicaments and medical stores intended for civilians of another signatory, even if the latter be an enemy.

Special provisions have been made for orphans and young children.

The right for all persons to give and to receive family news has been specified.

Chapter II comprises general rules for the protection of individuals in both belligerent and occupied countries. The taking of hostages is prohibited; so is torture of any kind. It is also stipulated that no person may be punished for an offense he has not himself committed; no death sentence may be executed except after regular trial and judgment by a regularly constituted tribunal.

Chapter III deals with enemy or alien civilians in belligerent countries. Their right to repatriation is affirmed, except on imperative grounds of public security; in that case their retention may only be decided after regular proceedings before a special court. Persons who are not repatriated may not be interned or placed in assigned residence except for imperative reasons and by decision of a court.

Chapter IV concerns occupied territories. Deportations are strictly prohibited; evacuations are only permissible in two specific cases and under certain definite conditions and safeguards. The rights and duties of the Occupying Power in regard to civilian labor, food supplies, public health and penal sanctions are also defined. Internment may only take place in exceptional cases and for imperative security reasons. A complete set of regulations has been drafted, on similar lines to those for prisoners of war, for the treatment of all interned civilians, whatever the reasons for their confinement.

Finally, the new convention provides for a central information agency for civilians, which may be organized by the International Committee of the Red Cross and be the same as that for prisoners of war.

¹⁵ Max Huber, Address to the Preliminary Red Cross Conference, Geneva, 1946.

Such, in broad outline, is the substance of the new Convention relative to the Protection of Civilians in Time of War. The text, as compared with the drafts approved by International Red Cross Conferences both at Tokyo (1934) and Stockholm (1948), shows many restrictions. These restrictions, against which the experts struggled in vain, result from the desire of governments to retain what to them appears the lowest possible measure of freedom required to face the exigencies of war. They refer particularly to the conditions under which the convention shall be applied in case of civil war (Article 3).

CONCLUSION

The restrictions, nevertheless, should not lead to any underestimation of what has been achieved.

Thus, the "Geneva legal code," which derives from the first Geneva Convention of 1864, continues under the emblem of the Red Cross to grow and gather strength. The additions made in 1906, 1929, and 1949 have produced a *corpus juris* as imposing as the Hague Conventions.

The Geneva Conventions start from the hypothesis that law is a primordial element of civilization. Their struggle is against war, which now threatens to annihilate entire peoples. Their aim is to safeguard respect for the human person, the fundamental rights of man and his dignity as a human being, in the hope that universal peace—the desire of all men of good will—may one day be established.

Conceived with the idea of limiting, so far as possible, the effects of any fresh war, the Geneva Conventions must be read in the spirit which dominated the discussions at the 1949 Conference—a spirit of reprobation of war. This indeed was stressed by M. Max Petitpierre, President of the Swiss Confederation and Chairman of the Geneva Conference, when he brought the Conference to a close with the words:

The idea of the Red Cross will not be fully understood unless it is seen that, beneath its superficial appearances, it should be interpreted as being, above all, a condemnation of war.

STATELESSNESS AS A CONSEQUENCE OF THE CONFLICT OF NATIONALITY LAWS

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Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws¹ permits "each state to determine under its own law who are its nationals." It is precisely because the loss and acquisition of nationality is a matter of unilateral state action that statelessness under certain conditions does occur. The loss of nationality is sometimes closely related to the methods by which nationality is acquired. Most common among these methods of acquisition are: (1) by birth, (2) by minority, (3) by marriage.

I. FAILURE TO ACQUIRE NATIONALITY AT BIRTH

Jus Soli v. Jus Sanguinis

According to the survey conducted by the Harvard Research, it appears that neither the doctrine of *jus soli* nor of *jus sanguinis* has been adopted to the exclusion of the other.² But the very fact that both systems are contemporaneously employed may give rise to cases of statelessness. Argentina, Bolivia, Brazil, Chile, Cuba, Panama, Paraguay, Peru, and Uruguay³ follow strictly the rule of *jus soli*; that is, the territory on which the birth occurs is the determining factor. On the other hand, Austria, China, Denmark, Finland, Germany, Hungary, Japan, The Netherlands, Norway, Poland, Rumania, Sweden, Switzerland, Turkey, and the U.S.S.R.⁴ adhere solely to *jus sanguinis*; that is, parentage is the deciding factor. The child of parents who are nationals of states following the *jus soli* principle, born in the territory of a state wherein nationality at birth is determined by *jus*

¹ Signed at The Hague, April 12, 1930. For complete text, see League of Nations Doc. C.351.M.145.1930.V.14, p. 31; Hudson, *International Legislation*, Vol. V, p. 359; this JOURNAL, Supp., Vol. 24 (1930), p. 192.

² Research in International Law: Draft Conventions on Nationality, Responsibility of States, Territorial Waters, this JOURNAL, Spec. Supp., Vol. 23 (1929), p. 29.

³ Argentina, Flournoy and Hudson, *A Collection of Nationality Laws* (1929), p. 10; Bolivia, R. H. Fitzgibbon (ed.), *The Constitutions of the Americas* (1948), p. 38; Brazil, *ibid.*, pp. 87-88; Chile, *ibid.*, p. 139; Cuba, *ibid.*, p. 228; Panama, *ibid.*, pp. 605-606; Paraguay, *ibid.*, p. 657; Peru, *ibid.*, p. 668; Uruguay, *ibid.*, p. 721. See also Harvard Research, *loc. cit.*, pp. 80-82.

⁴ Flournoy and Hudson, *op. cit.*: Austria, pp. 18-19; China, p. 175; Denmark, p. 214; Finland, p. 237; Germany, p. 306; Hungary, p. 337; Japan, p. 382; The Netherlands, p. 441; Norway, p. 453; Poland, p. 479; Rumania, p. 497; Sweden, p. 545; Switzerland, p. 560; Turkey, p. 570; U.S.S.R., p. 512.

sanguinis, is without a nationality. The parents' state does not confer nationality because the child was not born on its territory, while the state wherein the child was born also refuses because the parents are foreigners. Obviously, the child is stateless.

In some states where *jus sanguinis* is secondary, the effects of nationality by descent are limited if the parents were born abroad, or were abroad for a considerable time, or never resided in the territory of the state, or were naturalized. For example, the nationality law of the United States requires that if both parents are citizens and the child is born abroad, it is sufficient if one parent had resided in the United States before the birth of the child, but the length of this period is not stipulated.⁵ If one parent is an alien, the other parent must have resided for ten years, five after the age of sixteen, in the United States or outlying possessions, before the birth of the child. Moreover, the child must reside in the United States for a minimum of five years between the ages of thirteen and twenty-one years in order to retain his citizenship.⁶

The British Nationality Act of 1948 excludes from British citizenship a child born in a foreign country whose father was also born abroad and a citizen by descent, unless the child is registered within one year.⁷

According to these laws, American or British citizenship is not acquired unless or until some positive act has been performed, either by the child or its parents. However, if these acts cannot or have not been fulfilled and if the child is born in a state whose nationality laws follow solely the principle of *jus sanguinis*,⁸ the child is stateless.

Child of Stateless Parents

If a child is born of stateless parents in the territory of a state adhering strictly to *jus sanguinis*, the parents have no nationality with which to endow the child who, consequently, becomes stateless. Some states, for example, China, Italy, Japan, Poland, and Turkey,⁹ make modifications and in these circumstances grant nationality unconditionally. But there are still far too many states wherein, it would seem, statelessness is a disease that can be inherited. Stateless parents who are wise would avoid giving birth to children while in Austria, Denmark, Finland, Germany, Hungary, The Netherlands, Norway, Rumania, Sweden, Switzerland, and the U.S.S.R.¹⁰

⁵ 8 U. S. C. 601.

⁶ *Ibid.* This does not apply if the American parent at the time of the child's birth was abroad employed by the Government, or was a member of an international agency in which the United States participates, or employed by an American educational, scientific, philanthropic, religious, commercial, or financial organization.

⁷ Laws of England, Supplement, 1949, Hailsham ed., pp. 74-75.

⁸ See *supra*.

⁹ Flournoy and Hudson, *op. cit.*: China, p. 175; Italy, p. 363; Japan, p. 382; Poland, p. 480; Turkey, p. 570.

¹⁰ See *supra*.

Foundlings

If found in a state adhering to the *jus sanguinis* rule, a foundling is stateless because the parents are unknown; and if discovered in a state adhering to the *jus soli* rule, the child is stateless because the place of birth is unknown. However, the following states extend their nationality to a foundling, presuming birth to have taken place where the child was found *until the contrary has been proved*: Belgium, Denmark, Egypt, Germany, Hungary, Italy, The Netherlands, Norway, Sweden, Turkey, and the United States.¹¹ Because of the qualifying phrase—until the contrary has been proved—statelessness would result in several ways:

1. If the foundling were discovered in a state adhering strictly or principally to *jus soli*, and subsequently the child was shown to have been born in a *jus sanguinis* state and the parents were not nationals of that state but nationals of a third state following strictly the rule of *jus soli*. For example, a foundling first discovered in the United States is later proved to have been born in Switzerland of parents who are nationals of Argentina.

2. If the foundling were discovered either in a *jus soli* or *jus sanguinis* state, but later the child was shown to have been born in another state, either *jus soli* or *jus sanguinis*, which does not extend nationality to foundlings.

Birth Aboard Ships

The nationality provisions of some states differentiate between children born on the high seas and those born in territorial waters. A child born aboard a United States ship on the high seas of foreign parents is not considered a United States citizen.¹² If the laws of the parents' state followed, under such circumstances, the rule of *jus soli*, the child would be stateless. English law, on the other hand, declares all persons born aboard its ships, whether on the high seas or not, its citizens.¹³

While the United States claims as citizens all persons born aboard a ship in territorial waters, whether the ship is foreign or not,¹⁴ British law does not extend its citizenship to persons born on a foreign ship in territorial waters. There seems to be no question that a child born of foreign parents on a foreign ship in British territorial waters would be without nationality, provided that the laws of the parents' state did not confer nationality upon the child.

Illegitimate Children

In the laws of many states provision is made for the illegitimate child, wherever born, to follow the nationality of the mother if she is their national.

¹¹ Flournoy and Hudson, *op. cit.*: Belgium, p. 29; Denmark, p. 214; Egypt, p. 227; Germany, p. 306; Hungary, p. 339; Italy, p. 363; The Netherlands, p. 441; Norway, p. 454; Sweden, p. 546; Turkey, p. 570; United States, 8 U. S. C. 601, 604.

¹² Hackworth, *Digest* (1941), Vol. III, p. 11.

¹³ Laws of England, *op. cit.*, p. 74.

¹⁴ Hackworth, *op. cit.*, p. 10.

However, there are exceptions. The illegitimate child of a British woman, for example, born in Denmark, Germany, Iceland, Norway, Rumania or Sweden, is without a nationality because, according to British law,¹⁵ the child does not possess British nationality and by the laws of the other states it does not acquire their nationality.¹⁶

Other illustrations of illegitimacy giving rise to probable statelessness may be mentioned. In Finland, there are no provisions in the nationality laws relating to illegitimate children.¹⁷ The illegitimate child of a mother with United States nationality acquires her nationality only if she had previously resided in the United States or one of its outlying possessions.¹⁸ If the child were born in a state adhering to *jus sanguinis* and the mother had not resided in the United States, apparently the child would be without a nationality. The United States law also provides for citizenship of the child born out of wedlock if paternity is established.¹⁹ Under this provision, the unacknowledged child of an American father born of an alien woman abroad would be stateless, providing the woman's state does not extend its nationality to the child.

Because of conflicts of legitimation laws it often happens that an unacknowledged child is better situated than a legitimated child, at least as to the matter of nationality. State A may not recognize any effect upon nationality of the child by legitimation, while State B may recognize that the child loses its nationality and acquires another. In this instance, legitimation of B child by a national of A would cause the child to lose his B nationality, but State A would deny its nationality to the child who becomes destitute of nationality.²⁰ In Belgium, Czechoslovakia, and Poland, the nationality of the child follows the father's upon legitimation,²¹ but in Denmark, Iceland, Norway, Rumania, Sweden, and the United Kingdom, there are no legal provisions extending nationality to the legitimated child of a citizen father.²²

Eliminating Statelessness at Birth

Adopting either the principle of *jus soli* or *jus sanguinis* to the exclusion of the other would hardly be a satisfactory solution. If *jus soli* alone were

¹⁵ Oppenheim, *International Law* (6th ed., 1947), Vol. I, p. 610.

¹⁶ Flournoy and Hudson, *op. cit.*: Denmark, p. 214; Germany, p. 306; Iceland, p. 344; Norway, p. 453; Rumania, p. 497; Sweden, p. 545.

¹⁷ *Ibid.*, p. 237.

¹⁸ 8 U. S. C. 605.

¹⁹ *Ibid.*

²⁰ Cf. Committee of Experts for the Progressive Codification of International Law, Report submitted by M. Rundstein, League of Nations Doc. C.43.M.18.1926.V., p. 12; this JOURNAL, Spec. Supp., Vol. 20 (1926), p. 22.

²¹ Flournoy and Hudson, *op. cit.*: Belgium, p. 29; Czechoslovakia, p. 206; Poland, p. 480.

²² Flournoy and Hudson, *op. cit.*: Denmark, p. 214; Iceland, p. 344; Norway, p. 453; Rumania, p. 497; Sweden, p. 545; United Kingdom, Oppenheim, *op. cit.*, p. 597, n. 1.

the determinant of nationality at birth, cases of children and parents having different nationalities would often arise. If, on the other hand, *jus sanguinis* were the sole criterion, children of parents without nationality would also be stateless.²³ The Hague Codification Conference of 1930 was especially concerned with the latter difficulty. The Protocol Relating to a Certain Case of Statelessness was designed to eliminate statelessness of the child born in a state adhering to *jus sanguinis*, but permitting only the father to transmit nationality by descent. If the father were stateless, the child would also be stateless, even if the mother were a national of the state. Article 1 of the Protocol rectifies this situation by providing:

In a State whose nationality is not conferred by the mere fact of birth in its territory, a person born in its territory of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality shall have the nationality of the said State.²⁴

By the enactment of national legislation many states now permit the mother to transmit her nationality to the child,²⁵ so that statelessness in this connection is rapidly being eliminated.

Article 15 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws²⁶ extends the principle adopted in the Protocol to those cases where both parents are stateless. But the article in question is not as well stated as might be desired:

Where the nationality of a State is not acquired automatically by reason of birth on its territory, a child born on the territory of that State of parents having no nationality, or of unknown nationality, may obtain the nationality of the said State. *The law of that State shall determine the conditions governing the acquisition of its nationality in such cases.*²⁷

The article merely formulates the practice already existing and makes no innovations in the direction of eliminating statelessness of a child of parents with no nationality. If the state permits the child to acquire its nationality,

²³ In this respect the resolution adopted by the Institute of International Law in 1896 is obviously unacceptable: "A legitimate child follows the nationality with which its father was clothed on the day of its birth, or on the day when the father died." Scott (ed.), *Resolutions of the Institute of International Law* (1934), p. 133.

²⁴ League of Nations Doc. C.226.M.113.1930.V.; this JOURNAL, Supp., Vol. 24 (1930), p. 206.

²⁵ For the states which now follow this principle see Report Based on Replies to Part I, Sec. G (Nationality) of the Questionnaire on the Legal Status and Treatment of Women, U.N. Doc. E/CN.6/82 (Feb. 28, 1949), p. 13.

²⁶ The convention came into force in 1938 when it had been ratified or adhered to by the following ten states: Brazil, Canada, China, India, Monaco, The Netherlands, Norway, Poland, Sweden, and the United Kingdom. Subsequently, Belgium, Burma, and Australia ratified the convention. L. N. T. S., Vol. CLXXIX (1937), p. 91; Vol. CXCVI (1939), p. 476; Vol. CC (1940), p. 539; Treaties and Conventions in the Field of the Nationality of Women, U.N. Doc. E/CN.6/79, (Jan. 21, 1949), p. 17.

²⁷ Italics added.

the conditions governing such acquisition may require months or perhaps years of residence. In the meantime, the child is stateless.

Article 14, as does Article 15 with respect to children of stateless parents, fails to improve the nationality status of foundlings:

A child whose parents are both unknown shall have the nationality of the country of birth. If the child's parentage is established, its nationality shall be determined by the rules applicable in cases where the parentage is known.

A foundling is, until the contrary is proved, presumed to have been born on the territory of the State in which it was found.

As was noted previously,²⁸ a foundling could become stateless by the very act of establishing parentage or proving that the child was not born in the state concerned.

The contribution of the convention in eliminating statelessness accruing to illegitimate children is more noteworthy. Article 16 provides that if an illegitimate child loses its nationality because of legitimation or recognition, such loss shall be made upon the condition that another nationality is acquired. Other cases of statelessness of illegitimate children are being eliminated by the progressive adoption of national legislation. In the Western Hemisphere, the mother has the right to transmit her nationality to her illegitimate child.²⁹

The convention avoids stating any exclusive preference for either the rule of *jus soli* or *jus sanguinis*, this being not only understandable, but, as was noted above, desirable. However, some provision should be made to eliminate statelessness of the child of parents from a strictly *jus soli* state born in a solely *jus sanguinis* state.³⁰ Because such a provision was not included and because of the other improvements noted above, either the Hague Convention should be amended or an entirely new convention on nationality adopted. In either case, the following principles might well be considered:

1. The nationality of every child shall follow the nationality of the parents.³¹ If one parent is stateless, the nationality of the other parent shall descend to the child. If both parents are without nationality, the rule of *jus soli* shall be applicable.

2. Foundlings upon establishment of parentage follow the nationality of the parents.

²⁸ *Supra*, p. 478.

²⁹ Report of the Inter-American Commission of Women to the 8th International Conference of American States on the Political and Civil Rights of Women (1938), p. 85.

³⁰ *Supra*, p. 476.

³¹ *Cf.* the resolution adopted by the International Law Association in 1924, which provides that every child born within the state is a citizen, unless the alien father, or mother, or guardian registers the child for another nationality, but the child may within a year's time after reaching the age of twenty-one claim re-admission unconditionally. W. A. Bewes (ed.), *Transactions of the International Law Association* (1925), p. 125.

3. An illegitimate child follows the nationality of the mother. If the mother is without a nationality, the rule of *jus soli* shall be applicable. Legitimation shall have no effect upon the nationality of the child legitimated.³²

4. For the purposes of determining nationality at birth whenever the rule of *jus soli* is applicable, vessels, including aircraft, shall be considered as territory of the state wherein the vessel is registered.

II. STATELESS MINORS

It may happen in many cases that a minor of expatriated parents becomes stateless if, by the law of the former state, minors follow the nationality of parents, but the country of new nationality does not unconditionally or immediately extend its nationality to the child. In Albania, Czechoslovakia, Ecuador, Hungary, Iraq, Mexico, Nicaragua, Norway, Switzerland, the Vatican City, and Venezuela, change of nationality of the parents affects the minor children.³³ But in the following countries naturalization of parents does not automatically extend to minor children: Afghanistan, Argentina, Haiti, Norway, Sweden, Turkey, United States.³⁴ Similar cases of statelessness may occur, for example, if for any reason the parents lose their present nationality without acquiring another and the minor children follow the nationality of the parents. In this case, both parents and children are stateless.

A few states confer the nationality of the parent upon an adopted child.³⁵ But in those cases where the child does not acquire the nationality of the adopting parent and at the same time loses his present nationality, the child becomes a stateless person. To illustrate: In Albania, China, and Poland,³⁶ the adoption of a child by an alien parent causes the child to lose his Albanian, Chinese, or Polish nationality. However, if the parent adopting the child were a national of Austria, Rumania, the United States, or Yugoslavia,³⁷ the child would not acquire the nationality of the adopting parent.

³²The International Law Association had proposed in 1924 that "legitimation shall have no effect as to the nationality of the legitimated person. . . ." *Ibid.*, p. 126.

³³Flournoy and Hudson, *op. cit.*: Albania, p. 8; Czechoslovakia, pp. 202, 204; Ecuador, p. 224; Hungary, p. 340; Iraq, p. 351; Mexico, p. 429; Nicaragua, p. 452; Norway, p. 456; Switzerland, p. 558; the Vatican City, p. 637; Venezuela, p. 642.

³⁴Flournoy and Hudson, *op. cit.*: Afghanistan, p. 3; Argentina, p. 11; Haiti, p. 329; Norway, p. 455; Sweden, p. 547; Turkey, p. 569; United States, 8 U. S. C. 713.

³⁵Japan, Flournoy and Hudson, *op. cit.*, p. 382; Poland, *ibid.*, p. 480.

³⁶*Ibid.*, Albania, p. 5; China, p. 177; Poland, p. 480. It should be noted that the laws of some states make no provisions concerning adoption.

³⁷Austria, *ibid.*, p. 26; Rumania, *ibid.*, p. 497; United States, 8 U. S. C. 716, the adopting parent or both parents must be citizens of the United States, the child must be adopted before the age of sixteen, and the latter must have resided two years in the United States; Yugoslavia, Flournoy and Hudson, *op. cit.*, p. 398.

It would seem that the ideal nationality status of the family is to have the parents and children possess the same nationality. But because of the divergent views of the various states at the Hague Codification Conference of 1930, this principle was not adopted in the Convention on Nationality. The convention instead sought to avoid the occurrence of statelessness in minors by making the loss of nationality conditional upon the acquisition of the nationality of the parents. Since apparently conflicts of nationality laws still exist, the solution advocated in the Hague Convention is certainly effective and probably acceptable to states desiring to retain their existing system. For these reasons, the pertinent articles of the convention are quoted in full:

Article 13. Naturalisation of the parents shall confer on such of their children as, according to its law, are minors the nationality of the State by which the naturalisation is granted. In such case the law of that State may specify the conditions governing the acquisition of its nationality by the minor children as a result of the naturalisation of the parents. In cases where minor children do not acquire the nationality of their parents as the result of the naturalisation of the latter, they shall retain their existing nationality.

Article 17. If the law of a State recognises that its nationality may be lost as the result of adoption, this loss shall be conditional upon the acquisition by the person adopted of the nationality of the person by whom he is adopted, under the law of the State of which the latter is a national relating to the effect of adoption upon nationality.

III. STATELESSNESS AS A RESULT OF MARRIAGE

In early England naturalization was by special Act of Parliament. Thus by English and American common law, marriage of a woman citizen did not affect her nationality. But the motive for this practice was not the independence of women's citizenship, but the doctrine of indissoluble allegiance.³⁸ When in 1804 the French Civil Code based women's nationality upon the nationality of the husband, most of the continental and Latin-American states, influenced by the French lead, adopted this principle.³⁹ A law in 1844 provided that an alien woman marrying a British subject acquired his nationality.⁴⁰ By the law of February 10, 1855, any woman who married a citizen of the United States became a citizen.⁴¹ In neither of

³⁸ See *Shanks v. Dupont*, 3 Peters 242 (1830).

³⁹ C. Seckler-Hudson, *Statelessness: With Special Reference to the United States* (1934), pp. 23-25; W. E. Waltz, *The Nationality of Married Women* (1937), pp. 14-16; U. S. Congress, House of Representatives, *Effects of Nationality upon Marriage*, Hearings before Committee on Immigration and Naturalization, U. S. House of Representatives, 70th Cong., 1st Sess., Hearing No. 70.1.8, May 9, 1928, p. 3.

⁴⁰ Flournoy and Hudson, *op. cit.*, p. 59.

⁴¹ *Ibid.*, p. 577.

these Acts was there a provision concerning the effect of marriage upon a woman national who married an alien. However, the British Naturalization Act of 1870⁴² and the United States law of March 2, 1907,⁴³ provided that a woman citizen who married an alien was deemed a national of her husband's state.

In the meantime it became apparent that other states need not give alien women their nationality simply upon marriage to one of their nationals. As a consequence, France and other nations revised their laws permitting their citizen women to retain their nationality, unless by the law of the husband's state she acquired his nationality. A very few nations permitted their citizen women to retain their nationality regardless of the law of the husband's state. The example of the United States in extending this freedom to its women citizens in 1922⁴⁴ was, as we have seen, not an innovation, but a reversion to an earlier policy.⁴⁵

There exist today, then, three doctrines of nationality and marriage: (1) the doctrine of the unity of the family, whereby the wife's nationality always follows the husband's; (2) the doctrine of the independence of the woman's citizenship; (3) a combination of these doctrines, whereby the state provides for the unconditional acquisition of the husband's nationality if an alien woman marries its national, but a woman national marrying an alien loses nationality only under certain conditions, usually if the law of the husband's state confers his nationality upon the wife. The third practice does not result in statelessness, but the co-existence of the two principles of family unity and independence of citizenship is the basic difficulty and the cause of statelessness as a result of marriage.⁴⁶ The pattern of this loss of nationality follows roughly an element of time; that is, loss of nationality by the woman (1) at the time of marriage, or (2) during marriage, or (3) at the dissolution of marriage.

At the Time of Marriage

The following states are among those which follow the principle of the unity of the family and whose women nationals consequently lose their nationality unconditionally upon marriage to an alien: Afghanistan, Bolivia, Egypt, Germany, Haiti, Hungary, India, Iran, Iraq, Ireland, New Zealand, Palestine, Poland, Peru, Siam, Spain, Switzerland, and Union of South Africa.⁴⁷ A woman national of Iceland loses her nationality upon

⁴² *Ibid.*, p. 59.

⁴³ *Ibid.*, p. 601.

⁴⁴ Law of Sept. 22, 1922, better known as the Cable Act. *Ibid.*, p. 609.

⁴⁵ Seekler-Hudson, *op. cit.*, p. 24.

⁴⁶ Report of the First Committee of the 1930 Codification Conference, League of Nations Doc. A.19.1931.V., p. 4; this JOURNAL, Supp., Vol. 24 (1930), p. 228.

⁴⁷ Afghanistan, Flournoy and Hudson, *op. cit.*, p. 3; Bolivia, Effects of Nationality, *op. cit.*, p. 6; Egypt, *op. cit.*, U.N. Doc. E/CN.6/82, p. 5; Germany, Flournoy and Hud-

marriage to an alien if there is loss of domicile in Iceland.⁴⁸ On the other hand, those nations whose laws do not confer nationality upon a foreign woman who marries a national are: Argentina, Australia, Bulgaria, Brazil, Canada, Chile, Colombia, Cuba, Czechoslovakia, El Salvador, Guatemala, Mexico, New Zealand, Panama, Paraguay, Rumania, United Kingdom, United States, U.S.S.R., Uruguay, Venezuela, and Yugoslavia.⁴⁹ Some nations, though not generally conferring nationality upon a foreign woman who marries a national, do so conditionally; for example, Greece and Liberia.⁵⁰ If a woman national of Bolivia, Poland, or Spain (or of any nation whose women citizens lose their nationality by marriage to an alien) marries a national from Australia, Panama, or the United States (or from any state not conferring nationality on an alien woman marrying a national), or fails to meet certain conditions in the nationality laws of Greece or Liberia, then statelessness is inevitable.

During Marriage

The nationality laws of several states provide that a change in the husband's nationality during marriage affects the wife. Czechoslovakia, Hungary, Iraq, Poland, Spain, and Switzerland follow this principle unconditionally;⁵¹ while in Austria, Canada, China, Finland, France, Ger-

son, *op. cit.*, p. 309; Haiti, *ibid.*, pp. 328-329; Hungary, *ibid.*, p. 341; India, *op. cit.*, U.N. Doc. E/CN.6/82, p. 5; Iran, Effects of Nationality, *op. cit.*, p. 6; Iraq, Flournoy and Hudson, *op. cit.*, p. 351; Ireland, Effects of Nationality, *op. cit.*, p. 6; New Zealand (only Western Samoa and Cook Islands), *op. cit.*, U.N. Doc. E/CN.6/82, p. 5; Palestine, Effects of Nationality, *op. cit.*, p. 6; Poland, Flournoy and Hudson, *op. cit.*, p. 481; Peru, Effects of Nationality, *op. cit.*, p. 6; Siam, *op. cit.*, U.N. Doc. E/CN.6/82, p. 5; Spain, Flournoy and Hudson, *op. cit.*, p. 550; Switzerland, *ibid.*, p. 560; Union of South Africa, *op. cit.*, U.N. Doc. E/CN.6/82, p. 5.

⁴⁸ U.N. Doc. E/CN.6/82, *ibid.*, p. 5.

⁴⁹ Argentina, Flournoy and Hudson, *op. cit.*, p. 13; Australia, Addendum to the Report Based on Replies to Part I, Sec. G (Nationality) of the Questionnaire on the Legal Status and Treatment of Women, U.N. Doc. E/CN.6/82/Add. 2 (March 23, 1949), p. 1; Bulgaria, Study on the Position of Stateless Persons, U.N. Doc. E/1112/Add. 1 (May 16, 1949), p. 16; Brazil, Canada, Chile, *op. cit.*, U.N. Doc. E/CN.6/82, p. 4; Colombia, Flournoy and Hudson, *op. cit.*, p. 181; Cuba, Czechoslovakia, El Salvador, Guatemala, *op. cit.*, U.N. Doc. E/CN.6/82, p. 4; Mexico, Addendum to the Report . . . on Treatment of Women, U.N. Doc. E/CN.6/82/Add. 1 (Feb. 25, 1949), p. 1; New Zealand (except Western Samoa and Cook Islands), *op. cit.*, U.N. Doc. E/CN.6/82, p. 8; Paraguay, Flournoy and Hudson, *op. cit.*, p. 471; Rumania, *op. cit.*, U.N. Doc. E/1112/Add. 1, p. 16; United Kingdom, *op. cit.*, U.N. Doc. E/CN.6/82/Add. 2, p. 11; United States, 8 U. S. C. 710, 711; U.S.S.R., Flournoy and Hudson, *op. cit.*, p. 512; Uruguay, *ibid.*, p. 629; Venezuela, *op. cit.*, U.N. Doc. E/CN.6/82, p. 4; Yugoslavia, *op. cit.*, U.N. Doc. E/1112/Add. 1, p. 16.

⁵⁰ In Greece, the marriage ceremony must have taken place in the Greek Orthodox Church, *op. cit.*, U.N. Doc. E/CN.6/82, p. 5; in Liberia, the woman must be a negro, Flournoy and Hudson, *op. cit.*, p. 414.

⁵¹ Czechoslovakia (excluding Slovakia, unless a Slovakian husband loses his nationality because of military service in a foreign country), *op. cit.*, U.N. Doc. E/CN.6/82, p. 8;

many, New Zealand, Norway, Sweden, and Yugoslavia the wife is affected only under certain conditions.⁵² The wife becomes stateless if the husband from any of these nations acquires the nationality of a state which does not automatically confer its nationality upon the wife. Naturalization of an alien does not extend to the wife in the following countries: Argentina, Australia, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Cuba, France, Guatemala, Lebanon, Mexico, Monaco, India, New Zealand, Pakistan, Paraguay, Rumania, Sweden, Syria, Turkey, United Kingdom, United States, Uruguay, Venezuela, and Yugoslavia.⁵³ The possibilities of statelessness are increased because the naturalization of an alien husband does not extend to the wife in several countries except under certain conditions; for example, in Albania, Finland, Italy, Norway, Switzerland, and the Vatican City.⁵⁴

Hungary, Flournoy and Hudson, *op. cit.*, pp. 340-341; Iraq, *ibid.*, p. 351; Poland, *ibid.*, p. 481; Spain, *ibid.*, p. 538; Switzerland, *ibid.*, p. 558.

⁵² Austria, change affects wife if she has become Austrian by marriage, League of Nations Doc. C.73.M.38.1929.V., p. 89; Canada, change affects wife if she has become British by marriage, and the Governor-in-Council directs it, *op. cit.*, U.N. Doc. E/CN.6/82, p. 7; China, change affects wife if husband was naturalized Chinese and acquired another nationality subsequently, *ibid.*, p. 7; Finland, change affects wife if she has become Finnish by marriage, Flournoy and Hudson, *op. cit.*, p. 240; France, may affect a foreign-born wife if the husband is denationalized as a penalty, *op. cit.*, U.N. Doc. E/CN.6/82, p. 7; Germany, wife is affected if husband is a deserter and she is living with him, Flournoy and Hudson, *op. cit.*, pp. 310-311; New Zealand, the Minister of Interior has the power to extend denaturalization of the husband to the wife, *op. cit.*, U.N. Doc. E/CN.6/82, p. 7; Norway, wife affected if the husband was born abroad and had not lived in Norway by the age of twenty-two, Flournoy and Hudson, *op. cit.*, pp. 455-456; Sweden, same as Norway, *mutatis mutandis*, *ibid.*, p. 548; Yugoslavia, wife is affected if the husband is denationalized because he is from a country which was at war with Yugoslavia, unless the wife can prove she had no connection with the husband or that she is of the same nationality as the peoples of Yugoslavia, *op. cit.*, U.N. Doc. E/CN.6/82, p. 7.

⁵³ Argentina, Flournoy and Hudson, *op. cit.*, p. 12; Australia, *op. cit.*, U.N. Doc. E/CN.6/82/Add. 2, p. 2; Belgium, Brazil, *op. cit.*, U.N. Doc. E/CN.6/82, p. 8; Bulgaria, Flournoy and Hudson, *op. cit.*, p. 168; Canada, *op. cit.*, U.N. Doc. E/CN.6/82, p. 8; Chile, Flournoy and Hudson, *op. cit.*, p. 170; Colombia, Cuba, France, Guatemala, *op. cit.*, U.N. Doc. E/CN.6/82, p. 8; Lebanon, Effects of Nationality, *op. cit.*, p. 10; Mexico, *op. cit.*, U.N. Doc. E/CN.6/82/Add. 1, p. 2; Monaco, Flournoy and Hudson, *op. cit.*, p. 437; India, New Zealand, Pakistan, *op. cit.*, U.N. Doc. E/CN.6/82, p. 8; Paraguay, Flournoy and Hudson, *op. cit.*, p. 471; Rumania, *ibid.*, p. 497; Syria, *ibid.*, p. 302; Sweden, Turkey, United Kingdom, *op. cit.*, U.N. Doc. E/CN.6/82, p. 8; United States, 8 U.S.C. 710, 711; Uruguay, Flournoy and Hudson, *op. cit.*, p. 629; Venezuela, Yugoslavia, *op. cit.*, U.N. Doc. E/CN.6/82, p. 8.

⁵⁴ Albania, if living with husband, Flournoy and Hudson, *op. cit.*, p. 7; Finland, wife must reside in Finland, *ibid.*, p. 238; Italy, if living with husband, *ibid.*, p. 365; Norway, wife must reside in Norway, *ibid.*, p. 455; Switzerland, naturalization includes the wife if no exception is made by the Federal Government, *ibid.*, p. 557; Vatican City, wife must be domiciled in the Vatican City, *ibid.*, p. 636.

At the Dissolution of Marriage

Most nations which follow the doctrine of family unity permit an alien woman who has acquired their nationality by marriage to a national to retain their nationality after the dissolution of marriage. Exceptions to this practice are Siam and the Vatican City, where the wife automatically loses her Siamese or Vatican citizenship acquired by marriage when the marriage is dissolved.⁵⁵ In Liberia a woman who becomes Liberian by marriage loses that nationality at the dissolution of marriage if she is residing abroad.⁵⁶ On the other hand, only Siam (of those nations whose women citizens lose nationality upon marriage to an alien) permits the wife to regain her former nationality automatically if the marriage is dissolved. All the other nations require some positive action on the part of the woman to recover her nationality lost through marriage.⁵⁷ With this conflict of nationality laws, statelessness would result under the following conditions:

1. A woman who loses her nationality upon marriage to a foreigner acquires another if the husband is either a national of Liberia,⁵⁸ Siam, or the Vatican City.⁵⁹ Upon the dissolution of the marriage to either a Siamese national or a citizen of the Vatican, the woman becomes a stateless person, because she loses the nationality she acquired by marriage, but does not recover her former nationality. Upon the dissolution of the marriage to a Liberian national, the woman becomes a stateless person if she is not residing in Liberia.

2. A woman national of any country following a combination of the family unity doctrine and the doctrine of the independence of the woman's citizenship⁶⁰ would lose her former nationality and acquire another upon marriage to a national either of Liberia, Siam, or the Vatican City. At the dissolution of marriage, she would become stateless under the same conditions noted in paragraph 1 above.

3. A woman citizen of any country following the doctrine of the independence of woman's citizenship—examples would be: United States, U.S. S.R., and the United Kingdom—does not lose her existing nationality upon marriage to a national of either Liberia, Siam, or the Vatican City, even

⁵⁵ Siam, U.N. Doc. E/CN.6/82, p. 43; Vatican City, Flournoy and Hudson, *op. cit.*, p. 636.

⁵⁶ *Ibid.*, p. 414.

⁵⁷ Other nations require at least one of the following: application, residence, declaration, naturalization, decree, authorization, on request, on permission of the Minister of Interior, registration, sovereign ordinance. Most common are declaration and residence. Harvard Research, *op. cit.*, pp. 112-113.

⁵⁸ If the woman is a negro, Flournoy and Hudson, *op. cit.*, p. 414.

⁵⁹ If the woman is domiciled in the Vatican City, *ibid.*, p. 636.

⁶⁰ Albania, Flournoy and Hudson, *op. cit.*, p. 7; Japan, *ibid.*, pp. 382, 384; Portugal, *ibid.*, pp. 491-492; and Turkey, *ibid.*, p. 571.

though she acquires another. However, if she renounced her existing nationality and subsequently the marriage was dissolved, she would be stateless under the same conditions noted in paragraph 1 above.

Other Causes of Statelessness by Marriage

A woman marrying a stateless person or a person of unknown nationality may become stateless, especially if the laws of her state provide that women nationals follow the nationality of the husband.

If a woman should lose her nationality by marrying an alien and then fails to qualify for citizenship or immigration by the laws of her husband's country, she thereby becomes a stateless person.⁶¹

Elimination of Statelessness by Marriage

During its meeting in Venice on September 29, 1896, the Institute of International Law adopted a resolution stating that unless there is a contrary reservation at the time of naturalization, a change in the nationality of the husband affects the wife, but the wife has the right to recover her original nationality by declaration.⁶²

At the Thirty-first Conference of the International Law Association held at Buenos Aires in 1922, it was concluded that "it would be desirable to fix uniformly by treaty the nationality of married women, reserving to a married woman, as far as possible, the right to choose her own nationality."⁶³

The Model Statute adopted at the Association's Conference at Stockholm in 1924, provided, *inter alia*, that a woman of a conforming state (state adopting the Model Statute) would not lose her original nationality upon marriage to a national of a non-conforming state unless or until she acquired his nationality automatically or by naturalization. On the other hand, a woman of a conforming state marrying a national from another conforming state acquires his nationality unless by the law of her state she retains her nationality, or unless, at the time of marriage, she formally de-

⁶¹ It is interesting to note the many and varied types of aliens who are inadmissible to the United States: imbeciles; idiots; feeble-minded; epileptics; those suffering from constitutional psychopathic inferiority; those suffering from insanity; those suffering from tuberculosis (any form); chronic alcoholics; illiterates; anarchists; opposers of organized government; advocates of violent overthrow of government; those with records of crimes involving moral turpitude; prostitutes or persons who have profited from prostitution; those with loathsome or dangerous contagious diseases, including the following: actinomycosis, amebiasis, blastomycosis, favus, filariasis, gonorrhea, granuloma inguinale, keratoconjunctivitis infections, leishmaniasis, leprosy, lymphogranuloma venereum, mycetoma, paragonimiasis, ringworm of scalp, schistosomiasis, and yaws. Summary of United States Immigration Laws, U. S. Dept. of Justice, Immigration and Naturalization Service, April 15, 1946, pp. 1-2; AGO 14268, Dept. of the Army and Air Force, Feb. 11, 1949, pp. 2-3.

⁶² Scott, *op. cit.*, p. 134.

⁶³ Bewes, *op. cit.*, p. 125.

clares her desire to retain her original nationality. The wife would be influenced by the naturalization of the husband during marriage.⁶⁴

Article 19 of the Harvard Research Draft Convention on Nationality provides:

A woman who marries an alien shall, in the absence of a contrary election on her part, retain the nationality which she possessed before marriage, unless she becomes a national of the state of which her husband is a national and establishes or maintains a residence of a permanent character in the territory of that state.⁶⁵

It is evident that all these proposals seek to uphold the principle of the independence of women's nationality, and that, consequently, the adoption of the proposals would necessitate changes in the nationality laws only in those states following the principle of family unity. How governments have attempted to reconcile the co-existence of the two principles is still to be considered.

If all nations adopted either the principle of family unity or the principle of independence of citizenship, the problem of statelessness as a result of marriage would be solved. But the Preparatory Committee,⁶⁶ the First Committee of the Conference,⁶⁷ and finally the Hague Codification Conference of 1930 did not seek the universal adoption of either legal system. Instead, the Convention on Nationality permitted each nation to retain its own system, but those nations with laws perpetuating family unity would agree that the loss of nationality shall be conditional on the acquisition of another. The relevant articles of the convention pertaining to women's nationality are as follows:

Article 8. If the national law of the wife causes her to lose her nationality on marriage with a foreigner, this consequence shall be conditional on her acquiring the nationality of the husband.

Article 9. If the national law of the wife causes her to lose her nationality upon a change in the nationality of her husband occurring during marriage, this consequence shall be conditional on her acquiring her husband's new nationality.⁶⁸

While these articles are intended to prevent statelessness at the time of and during marriage, there is nothing in the convention which would prevent the occurrence of statelessness at the dissolution of marriage. It also

⁶⁴ *Ibid.*, p. 126.

⁶⁵ Harvard Research, *op. cit.*, pp. 69-76.

⁶⁶ Observations of the Preparatory Committee, League of Nations Doc. C.73.M.38. 1929.V., p. 94.

⁶⁷ Report of the First Committee of the Conference, League of Nations Doc. A.191. 1931.V., p. 2.

⁶⁸ Arts. 10 and 11 of the convention, while also concerned with marriage, are designed to eliminate dual nationality. For complete text, see League of Nations Doc. C.351.M. 145.1930.V.14., p. 31; also this JOURNAL, Supp., Vol. 24 (1930), p. 192.

seems important to note that only nations pursuing the doctrine of family unity are required to make concessions. According to Articles 8 and 9, this doctrine can be exercised without limit only between nationals of countries which follow the doctrine. If a marriage occurred between a woman of one of these nations and a foreigner from a state following the principle of the independence of citizenship, the former nation would not be able to follow its doctrine of family unity, since the wife has not acquired the nationality of the husband. The same conclusion would apply if the husband of a family unity state became a naturalized citizen of a nation where independence of citizenship was the rule.

This may partially account for the fact that only thirty-eight states out of sixty-six invited signed the convention, and that seven of the signatory states presented reservations, all on the articles dealing with marriage.⁶⁹

Another reason probably accounting for the small number of ratifications was the opposition of those states which followed the doctrine of independence of citizenship. Not unheard were the various women's organizations crusading for the "equality" of the sexes. Even though the Final Act of the Conference recommended equality and no change in the wife's nationality without her consent,⁷⁰ the fact that these sentiments were not embodied in the convention proper raised a storm of disapproval among the world's women's organizations.⁷¹ Their arguments consisted mainly of differentiating between true family unity, which no laws could control, and juridical unity. They advocated greater facility in acquiring the nationality of the spouse if the wife should consent.⁷²

The influence of these women's organizations cannot be lightly brushed aside. They were partially responsible for the proposal, submitted by Peru, Guatemala, and Venezuela, that the question be studied further.⁷³ As a preliminary move, the Secretary General of the League of Nations appointed a Committee of Representatives of the Women's International Organizations for the purpose of making observations. The Committee met in July, 1931, reported its opposition to the Hague Convention on

⁶⁹ Colombia, Art. 10; Cuba, Arts. 9, 10, 11; Denmark, Arts. 5, 11; Japan, Art. 10; The Netherlands, Arts. 8, 9, 10; Sweden, Art. 11, second sentence; Switzerland, Art. 10. *Op. cit.*, League of Nations Doc. A.19.1931.V., pp. 2, 6.

⁷⁰ League of Nations Doc. C.228.M.115.1930.V. (Conf. C.D.I.), p. 14; this JOURNAL, Supp., Vol. 24 (1930), p. 183.

⁷¹ "These Articles . . . would, if ratified, give recognition in an international convention to the old idea of the subordinate position of women in the matter of nationality and to the old custom by which a woman's nationality was made to depend upon that of her husband." "Proposals of the Committee of Representatives of Women's International Organizations," Report by the Secretary-General on the Nationality of Women, League of Nations Doc. A.19.1931.V., p. 8.

⁷² For a more detailed defense of women's equality on matters of nationality, see *ibid.*, p. 10.

⁷³ *Ibid.*, p. 1.

Nationality, and recommended a new convention containing the following principle:

The Contracting States agree that from the going into effect of this Convention there shall be no distinction based on sex in their law and practice relating to nationality.⁷⁴

It would seem that the Committee emphasized equality, regardless of consequence, as long as loss of nationality to women resulted under the same conditions as loss to men.

The League Assembly then requested the Secretary General to ascertain the opinion of those governments which had attended the Hague Conference as to whether or not they would look with favor upon a modification of the convention. The replies generally held that the convention went as far as was to be expected, and the Member States were unwilling to call a special conference. Although the question was revived often enough, it did not again during the League's existence command enough support to warrant a special conference.⁷⁵

The Inter-American Conference at Montevideo in 1933 adopted not one, but two conventions pertaining to nationality and women. The Convention of the Nationality of Women contains a single article stating that the ratifying states agree that "there shall be no distinction based on sex as regards nationality, in their legislation or in their practice,"⁷⁶ and has been ratified by Brazil, Chile, Colombia, Ecuador, Guatemala, Honduras (with reservation), Mexico (with reservation), Paraguay, and the United States.⁷⁷

The Convention on Nationality, however, was more elaborate and, with regard to women's nationality, contained two articles:

Article 5. Naturalization confers nationality solely on the naturalized individual and the loss of nationality, whatever shall be the form in which it takes place, affects only the person who has suffered the loss.

Article 6. Neither matrimony nor its dissolution affects the nationality of the husband or wife or of their children.⁷⁸

The convention has been ratified or adhered to by five states, but with three states insisting on reservations, the convention, at least that part concerning women's nationality, is ineffectual: Brazil (reservation on Article 5); Chile; Ecuador; Honduras (reservations on Articles 5 and 6); and Mexico (reservations on Articles 5 and 6).⁷⁹

⁷⁴ Observations by the Committee of Representatives of Women's International Organizations, League of Nations Doc. A.23.1932.V., pp. 2-3.

⁷⁵ Report on Studies by the League of Nations in the Field of Nationality of Women, U.N. Doc. E/CN.6/84, Feb. 7, 1949, 17 pp.

⁷⁶ U. S. Treaty Series, No. 875; this JOURNAL, Supp., Vol. 28 (1934), p. 61.

⁷⁷ International Conferences of American States, 1933-1940, pp. 106-107.

⁷⁸ Hudson, International Legislation, Vol. VI, p. 596; this JOURNAL, Supp., Vol. 28 (1934), p. 63.

⁷⁹ International Conferences of American States, 1933-1940, pp. 108-109.

By comparing the two conventions, it will be seen that the Convention on the Nationality of Women by itself cannot prevent statelessness. It is possible for the nationality laws of State A to provide for the loss of nationality to *both* men and women who marry foreigners. State B might not extend its nationality to any foreigner who marries a national. In this case, neither State A nor State B discriminates in its nationality laws; yet in the event that nationals of State A, men or women, marry nationals of State B, there would be an increase of statelessness. Either both conventions or the Convention on Nationality (without reservations) alone would need to be ratified to prevent the occurrence of statelessness.

Not only is mere equality insufficient, but it could be disadvantageous to women. For example, naturalization of an alien wife of a national of Canada, Cuba, Czechoslovakia, El Salvador, Guatemala, New Zealand, and the United States is facilitated.⁸⁰ Equality would deprive a woman of this advantage if she desired to acquire the nationality of her husband.

Consideration by the United Nations of the nationality of women has progressed from a "sub-nuclear" Commission on the Status of Women under the "nuclear" Commission on Human Rights set up by the Economic and Social Council to the full Commission on the Status of Women⁸¹ established on June 21, 1946. The Commission consists of one representative each from fifteen Member Nations⁸² with the function of promoting equal rights for women in political, economic, civil, social, and educational fields.

The Economic and Social Council had already requested the Secretary General to give assistance by undertaking "a complete and detailed study of the legislation concerning the status of women and the practical application of such legislation."⁸³ The entire report had not been completed when the Commission held its first session at Lake Success from February 10 to 24, 1947, but the Commission did list as one of its aims the right of a woman "to retain her own nationality. . . ."⁸⁴ In the meantime, the Secretary General had sent questionnaires to seventy-three nations, and a preliminary report was completed by September 1, 1947. At its second session in January, 1948, the Commission discussed the report and the conflicts that arise between national laws relative to the nationality of married women.⁸⁵

⁸⁰ U.N. Doc. E/CN.6/82, p. 4.

⁸¹ Commission on the Status of Women, U.N. Background Paper No. 26 (Nov. 25, 1947), pp. 1-3.

⁸² Australia, Byelorussian S.S.R., China, Costa Rica, Denmark, France, Guatemala, India, Mexico, Syria, Turkey, United Kingdom, United States, U.S.S.R., and Venezuela. U.N. Doc. E/281/Rev. 1 (March 15, 1947), p. 1.

⁸³ Report of the Secretary-General on the Work of the Organization, U.N. Doc. A/65 (June 30, 1946), p. 19.

⁸⁴ U.N. Doc. E/281/Rev. 1, p. 10.

⁸⁵ What the U.N. is Doing for the Status of Women, U.N. Publications (1948), pp. 10-12.

On August 30, 1948, the Economic and Social Council, in resolution 154, requested the Secretary General to prepare a report on the conflict of nationality laws based on the information furnished by Member States and another one on existing treaties and conventions in the field of nationality.⁸⁶

These reports⁸⁷ were considered by the Commission on the Status of Women during its third session held in July and August of 1949, and resulted in a recommendation that a convention on the nationality of women be prepared as promptly as possible.⁸⁸ Finally, Article 16 of the Declaration on Human Rights adopted by the General Assembly on December 10, 1948, declares that men and women "are entitled to equal rights as to marriage, during marriage, and at its dissolution."⁸⁹

It is clear that the universal adoption of any one of the doctrines of nationality and marriage to the exclusion of the others would eliminate statelessness as a result of marriage. Obviously preferable to the vast majority of women is the "independence" principle which not only prevents statelessness but guarantees to women the right of individual autonomy in matters of marriage and nationality. However, it cannot be expected that all "unity" states will alter generations of social policy and unanimously accept an international convention embodying the principle of independence.⁹⁰ But there is nothing to prevent national and international organizations from persuading "unity" states to adopt the doctrine of independence.

⁸⁶ U.N. Doc. E/1065 (Aug. 30, 1948), p. 29.

⁸⁷ U.N. Docs. E/CN.6/82; E/CN.6/82/Add. 1, 2, 3; E/CN.6/79.

⁸⁸ Report of Third Session of Commission on the Status of Women, U.N. Doc. E/1462 (July 27, 1949), p. 3.

⁸⁹ U.N. Doc. A/811, Dec. 16, 1948; this JOURNAL, Supp., Vol. 43 (1949), p. 130.

More general consideration of the entire problem of statelessness is being given by the Economic and Social Council, the International Law Commission, and the Secretariat of the United Nations. By resolution of Aug. 8, 1949, an *ad hoc* committee of nine governments—later three more were added—was appointed by ECOSOC to consider the desirability of a draft convention on the status of stateless persons and to consider the means of eliminating statelessness. The report is to be submitted by the Secretary General to the Member Governments for comment and thence to ECOSOC. The governments represented on the committee are: Belgium, Brazil, Canada, China, Denmark, France, Israel, Poland, United Kingdom, United States, U.S.S.R., and Venezuela. U.N. Docs. E/1517 (Aug. 11, 1949), p. 3; E/1518 (Aug. 11, 1949), pp. 1-2.

The questions of statelessness and nationality were selected by the International Law Commission for codification, but did not receive top priority, which went to the law of treaties, arbitral procedure, and the régime of the high seas. Report of the International Law Commission, First Sess., April 12-June 9, 1949, U.N. Doc. A/925 (June 24, 1949), p. 3; this JOURNAL, Supp., Vol. 44 (1950), p. 7.

The Secretariat, besides compiling information for the Commission on the Status of Women and ECOSOC, has released a mimeographed Study on the Position of Stateless Persons, U.N. Docs. E/1112, Vol. I (Feb. 1, 1949), and E/1112/Add. 1, Vol. II (May 15, 1949).

⁹⁰ See letters to the League of Nations from the Governments of Japan, The Netherlands and Rumania, League of Nations Doc. A.15.1932.V., pp. 7-9.

In the meantime an international convention employing a stopgap system to prevent statelessness by marriage should be presented for adoption.

From an examination of the possible marriage combinations under present conditions, statelessness results only when a marriage takes place between a citizen woman of a "unity" state and a national of an "equality" state.⁹¹ Prevention of statelessness from occurring in such marriages would call for either (1) the extension of an "independence" state's nationality to a woman who has lost her original nationality, or (2) permitting a woman citizen of a "unity" state to retain her nationality unless she acquires her husband's nationality. This second alternative is essentially the one adopted in the Hague Convention on Nationality. The objection to the first alternative seems to be the reluctance of an "independence" state to extend its nationality to a woman who may never reside in its territory. An answer to this objection is the extension of nationality on the condition that the wife establishes permanent residence within the state.

The following proposals are not expected to receive the enthusiastic support of many women's organizations. However, the proposals answer some previous objections, raise no new ones, and, above all, are designed primarily to prevent statelessness of women as a result of marriage:

1. A woman national loses her original nationality if she acquires her husband's nationality and resides in his state. If she continues to reside in her own state or in a third state, she retains her original nationality. A foreign woman will acquire her husband's nationality if she establishes permanent residence within the territory of her husband's state.

2. A change in the husband's nationality will not affect the wife unless she acquires his new nationality and resides in his state. If she continues to reside in her own state or in a third state, she retains her original nationality. Naturalization of the husband extends to the wife if she establishes permanent residence within the territory of her husband's new state.

3. A woman who has acquired her husband's nationality as a result of marriage shall retain that nationality after the dissolution of marriage. A woman who has lost her nationality by marriage may reacquire her original nationality after the dissolution of marriage if she establishes permanent residence within the territory of her former state.

⁹¹ It should be noted that in some cases, a woman may possess two nationalities. In some respects this is an advantage over having one nationality, and certainly better than having no nationality. However, a state cannot extend diplomatic protection to a national against another state also claiming the person as a national. See Art. 4 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws. In solving the conflicts of dual nationality, international tribunals have employed the principle of "active nationality." Briggs, *The Law of Nations* (1946), p. 165.

NEUTRAL STATES AND THE EXTRADITION OF WAR CRIMINALS¹

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The determination of the Allied Powers to seize and punish war criminals was implemented several years ago by the corollary decision to ask for their extradition from foreign countries. President Roosevelt announced on October 7, 1942:

I now declare it to be the intention of this Government, that the successful close of the war shall include provision for the surrender to the United Nations of war criminals.²

This declaration constitutes the second attempt in recent years to effect the extradition of war criminals to Allied courts. Articles 227 and 228 of the Treaty of Versailles³ had already provided for the arraignment of William II and other German leaders before an Allied tribunal.⁴ A special request was addressed to The Netherlands for the surrender of the ex-Kaiser, while the German Government was to hand over certain former war leaders. But The Netherlands refused the demand for extradition, while the German Government maintained its constitutional disability to surrender a German citizen.⁵

In the recent war, the Allied Powers decided to proceed against war criminals in a more thorough fashion. Consequently, the three principal Powers who participated in the Moscow Declaration of October 30, 1943,⁶

¹ The term "war criminal" is used here in that broad sense which has now become current, including not only violators of the rules of war, but also those accused of atrocities and of "crimes against peace."

² The New York Times, Oct. 7, 1942.

³ U. S. Treaty Series, No. 678; this JOURNAL, Supp., Vol. 13 (1919), p. 151.

⁴ See James Brown Scott, "The Trial of the Kaiser," in Edward H. House and Charles Seymour, *What Really Happened in Paris* (New York, 1921), p. 237; James W. Garner, "Punishment of Offenders against the Laws and Customs of War," this JOURNAL, Vol. 14 (1920), pp. 70 ff.; Quincy Wright, "The Legal Liability of the Kaiser," *American Political Science Review*, Vol. XIII (1919), pp. 121 ff. It should be noted that the extra-legal nature of the indictment against the ex-Kaiser was well recognized in Art. 227 of the Versailles Treaty itself by proclaiming that the accused was to be arraigned for "a supreme offense against international morality and the sanctity of treaties." Analogously, the international tribunal which was to try him was to be "guided by the highest motives of international policy, with a view of vindicating the solemn obligations of international morality."

⁵ Weimar Constitution, Art. 112; see Wolfgang Mettgenberg, *Ein Deutscher darf nicht ausgeliefert werden* (Berlin, 1925).

⁶ This JOURNAL, Supp., Vol. 38 (1944), p. 5.

reaffirming their determination to bring war criminals to trial, divided all war crimes and their treatment into two groups. Those offenses which could be localized were to be tried by the countries in whose territories or against whose nationals the alleged crimes had been committed. Crimes which could not be so localized were to be tried by an inter-Allied court.

It is clear therefore that the problem of obtaining the extradition of a war criminal who has managed to escape abroad fell into two separate categories: (1) where one of the Allied countries demanded the surrender of the fugitive for trial in its national courts under national law; (2) where the Allied Control Commission demanded his surrender for trial by an international tribunal under rules in which Allied statesmen and some scholars profess to see a new and valid concept of international law. The latter type of extradition appears to concern fugitives from Germany alone, as Japanese leaders had little opportunity to reach neutral shores. At the time that these lines are written, several important Nazi leaders are still missing, among them the former Deputy Fuehrer, Martin Bormann.

The bases of all extradition are statutes and treaties. While Grotius held that a state had the duty "*aut dedere, aut punire*,"⁷ it is unquestionable modern doctrine that

unless a state is restricted by an extradition law, it can grant extradition for any crime it thinks fit. And unless a state is bound by an extradition treaty, it can refuse extradition for any crime.⁸

The United States, like most other countries, has always adhered strictly to this view.⁹ Only a small number of countries, particularly those in Latin America which have few extradition treaties with other nations, hold that even in the absence of a treaty, there exists a duty to grant extradition under international law.¹⁰ The overwhelming majority of nations, however, consider that the law of extradition is solely based on treaties,

⁷ Hugo Grotius, *De Jure Belli ac Pacis*, Vol. II, ch. XXI, Sec. V, Nos. 1 and 2. See André Mercier, "*L'Extradition*," in *Académie de Droit International, Recueil des Cours* (1930), Vol. III, p. 181.

⁸ L. Oppenheim, *International Law* (5th ed. by H. Lauterpacht, London, New York, Toronto, 1937), Vol. I, pp. 558 ff.

⁹ See Secretary of State Jefferson to President Washington, Nov. 9, 1791, quoted by John B. Moore, *Extradition and Interstate Rendition* (Boston, 1891), Vol. I, pp. 22 ff.; Secretary of State Webster to Lord Ashburton, Aug. 1, 1842, quoted by Moore, *op. cit.*, Vol. I, p. 15; Secretary of State Marcy to Mr. Hulsemann, Austrian Chargé d'Affaires, Sept. 26, 1853, *ibid.*; and in "Report of the Secretary of State," Dec. 5, 1853, Senate Documents, 33rd Cong., 1st Sess., Vol. I, pp. 23-50; Commonwealth ex rel. Short v. Deacon, 10 Sergeant & Rawle 125 (1823); Holmes v. Jennison, 14 Peters 540 (1840); U. S. v. Rauscher, 119 U. S. 407 (1886).

¹⁰ In re Gonzales, *Memoria de la Corte Federal y Casación de Venezuela* (1927), p. 115; In re Fernando Benet *Memoria* (1927), p. 154; In re Manuel Augusto Marques da Silva, 145 *Fallos de la Corte Suprema* (Argentina) 391 (1927). A similar decision was handed down in the case of Tsieras, Rumanian Court of Cassation, March 20, 1929, in *Annual Digest of Public International Law Cases*, 1929/30, No. 173.

statutes, and judicial interpretation. Therefore treaties between allied countries dealing with the surrender of war criminals do not run counter to international law in any way.¹¹ But such agreements do not bind those countries which remained neutral during World War II, and it is primarily with respect to those countries that our problem arises.

A neutral country which had voluntarily or inadvertently granted refuge to a war criminal, and which was faced by a demand of the Allied Control Council to hand him over, would have been faced by three principal legal problems: (a) the status of the Allied Control Commission and the relationship between that body and the neutral; (b) the character of the International Military Tribunal; (c) the nature of the charges against the accused and the legal grounds on which they are based.

The status of the Allied Control Commission for Germany was not easily fitted into traditional patterns. It would seem fairly clear that the Allied occupation of Germany cannot be considered a belligerent occupation under Articles 42 to 56 of the Hague Rules of Land Warfare because such a state of affairs would have to be predicated upon the assumption that Germany still existed as a sovereign state while the commission was still in existence and that the war between Germany and the Allies had not come to an end. Moreover, if Germany had merely been under a belligerent occupation, most of the administrative changes inaugurated by the Allied Control Commission and the zone commanders would have been illegal.¹² In view of the obvious fact that it was impossible to consider Germany a sovereign state at that time, it is difficult to avoid the conclusion that the war between Germany and the Allies has actually come to an end through the disappearance of one of the belligerents. A number of European publicists are content to recognize this process of *debellatio* when a belligerent has lost its sovereignty and disappeared as a state,¹³ but it has been customary with most Anglo-American writers to recognize subjugation only when there has been

extermination in war of one of the belligerents by another through annexation of the former's territory after conquest, the enemy forces having been annihilated.¹⁴

¹¹ Fleischmann's assertion (in his 12th edition of Franz von Liszt's *Voelkerrecht* (Berlin, 1925), p. 357, note 10) that Art. 228 of the Treaty of Versailles, providing for the extradition of certain alleged German war criminals, constituted a "disgraceful violation of the principles of international law" is therefore without foundation. Treaties, including peace treaties, may regulate extradition as the parties see fit.

¹² See James W. Garner's comment on German military government in Belgium 1914-18, in *International Law and the World War* (New York, London, 1920), Vol. II, pp. 58-185.

¹³ Liszt, *Voelkerrecht*, p. 556; Alfred von Verdross, *Voelkerrecht* (Berlin, 1937), p. 290; Georg Schwarzenberger, *International Law* (London, 1945), Vol. I, p. 331.

¹⁴ Oppenheim, *op. cit.* (6th ed. by H. Lauterpacht), Vol. II, p. 467. See also C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed., Boston, 1945), Vol. III, pp. 2389 ff.

While it is thus undeniable that Germany's armed forces have been annihilated and the state exterminated at least until 1949, it is equally clear that no annexation has taken place west of Stettin and the rivers Oder and Neisse. Nevertheless it appears entirely logical to suggest that the rules of subjugation be analogously applied to the present situation as the Allied Powers had actually assumed unrestricted sovereignty over Germany by the exercise of a temporary *condominium*.¹⁵ This theory was further substantiated by the joint declaration of the four occupation Powers by which they proclaimed the assumption of

... supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal or local government or authority.¹⁶

This declaration, by which the four Allied Powers assumed actual sovereignty in Germany, should apparently also be interpreted as to claim for them full (universal) succession into all rights and duties formerly exercised by the German state and government.

While these views are perfectly tenable, their logic is not entirely compelling. Neutral states may well hold that the declaration of unconditional surrender constituted an armistice, and that the subsequent Declaration of Berlin of June 5, 1945, was made as a result thereof. Since neutrals were not parties to the surrender agreement they need not feel affected either by the surrender or by the Declaration of Berlin. Consequently they were entitled to see in the Control Commission régime in Germany nothing but a post-armistice occupation which did not transfer sovereignty to the occupier. Thus, while the Declaration of Berlin may not be lacking in legality since absolute freedom of action by the victors is legalized by the terms of unconditional surrender, it concerned only the relationship between Germans and Allies, and is inoperative outside the occupied territory.¹⁷

Even if the sovereignty of the Allied Control Commission were recognized, it would not follow from such recognition that succession had taken place. The neutral states would have been well within their rights, as well as acting on the basis of reasonable logic, to regard the quadripartite government of Germany as a distinct and new creation and not as the successor to the defunct Reich government of former days. Therefore, even in the event of the recognition of Allied sovereignty in Germany, the Control Commission would not automatically have entered into all extradition

¹⁵ Hans Kelsen, "The Legal Status of Germany according to the Declaration of Berlin," this JOURNAL, Vol. 39 (1945), p. 518.

¹⁶ Declaration of the United States of America, the United Kingdom, the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic, Berlin, June 5, 1945. This JOURNAL, Supp., Vol. 39 (1945), p. 171.

¹⁷ Carl Meurer, *Die völkerrechtliche Stellung der vom Feinde besetzten Gebiete* (Tuebingen, 1915), p. 13.

treaties which Germany had concluded with other Powers. Since no treaties existed between the Allied Control Commission and neutral states, it follows that no duty to extradite existed among the latter.¹⁸

It is difficult to deny the legality of the International Military Tribunal established at Nuernberg. The right to set up courts is in no way denied to the belligerent occupant by the Hague Rules of Land Warfare. The fact that Germany surrendered unconditionally, and of the Declaration of Berlin resulting therefrom, are irrefutable proofs of this right. The difficulty lies not so much in the legality of the court as in its nature. Several countries, among them Sweden¹⁹ and Switzerland,²⁰ have provisions in their respective extradition statutes, prohibiting extradition if the fugitive offender is to be tried before a "special" tribunal. What constitutes a "special" court? The Swedish law describes it as

... a court which has been invested with authority to judge cases of such a nature only for the time being or for specific exceptional cases. Even more explicit is the opinion of the highest Swiss court, the Federal Tribunal, which considers a court "regular" only

... when it is to be regarded as a permanent court established for a certain category of cases, but not when it is assigned certain cases only exceptionally and from time to time, according to the discretion of some authority.²¹

The International Military Tribunal at Nuernberg cannot be termed "regular" withing the meaning of the Swiss and Swedish laws. The fact that it was a military court would not in itself make it "special," provided it had been of a permanent nature and had been meant to deal with such cases habitually. But it was not a permanent court. It was established by the Allied Powers specifically in order to try certain persons and organizations. Thus neither Switzerland nor Sweden, under their statutes, could have agreed to surrender an alleged war criminal if he was to be tried before the International Military Tribunal.

However, the greatest obstacle to the extradition of war criminals lies in the nature of the charges made against them and in the legal concept on which these charges are based. Few states will consent to surrender a person unless the crime with which he is charged is either listed in an extradition treaty²² or is at any rate considered a criminal offense by the

¹⁸ But states may in their discretion and purely as a matter of comity grant extradition even in the absence of a treaty and of definite assurance of reciprocity, unless such surrender is prohibited by statute.

¹⁹ Art. 11, Sec. 3, Law of June 4, 1913. This JOURNAL, Supp., Vol. 29 (1935), Pt. I, p. 416.

²⁰ Art. 9, Law of Jan. 22, 1892. *Feuille Fédérale*, Vol. I, p. 444.

²¹ Case of Kilatschitsky, *Entscheidungen des schweizerischen Bundesgerichts* (1907), Vol. 33, I, p. 408.

²² The majority of states list all extradition crimes in their treaties. Some (e.g., Switzerland) list them also in their laws.

laws of the requested state. While this principle of double criminality has recently been somewhat jolted,²³ it is still to be found in the overwhelming majority of extradition statutes²⁴ and treaties.²⁵ Extradition can only be granted, therefore, when the offenses charged are considered both criminal and extraditable by the laws and treaties of the requested state. It immediately becomes clear that the application of that rule makes extradition of war criminals extremely difficult, if not impossible.

Nor is there the slightest evidence that any neutral country recognizes the new concepts of international law underlying most of the charges before the International Military Tribunal at Nuernberg.

One group of charges dealt with war crimes in the traditional sense, namely, violations of the rules of warfare. Such violations of international law are usually made criminal offenses in most states by including them in their military laws and regulations.²⁶ Thus, such charges might come under the heading of military crimes, *i.e.*, offenses made criminal by military law only and not by civil law.²⁷ Military offenses are not as generally excluded from extradition as political crimes, although a number of states expressly forbid such extradition. But practically the same result is achieved in most countries by not mentioning military offenses in their lists of extraditable crimes. Outright authorization to surrender a fugitive charged with a violation of military law is very rare.²⁸ Inasmuch as violations of the rules of land and naval warfare are charged, extradition may be refused because the offenses may be deemed to constitute "purely military" crimes.²⁹

All these difficulties are, however, of a minor character when compared with the one principal defense which any war criminal, threatened by a

²³ *Factor v. Laubenheimer et al.*, 290 U. S. 276 (1933); *Case of Blackmer*, Annual Digest, 1931/32, No. 160. For a vigorous refutation of the court's view in the *Factor* case, see Manley O. Hudson, "The *Factor* Case and Double Criminality in Extradition," this JOURNAL, Vol. 28 (1934), pp. 274 ff.; and Edwin Borchard, *ibid.*, p. 742. See also *Rex v. Corrigan*, [1930] 1 K.B. 527; *Rex v. Flannery*, 3 Dominion Law Reports 689, Annual Digest, 1919/20, No. 200.

²⁴ Swedish Extradition Act, Art. 4; Swiss Extradition Act, Art. 6.

²⁵ *E.g.*, Art. 3, sec. 1, Treaty between Germany and Turkey of Sept. 3, 1930. 133 League of Nations Treaty Series 334.

²⁶ See War Department, 1940, Rules of Land Warfare, Field Manual 27-10.

²⁷ Harvard Research in International Law, Draft Convention, this JOURNAL, Supp., Vol. 29 (1935), Pt. I, pp. 119-122. See also: Moore, Extradition, Vol. I, pp. 611-623; Albert Billot, *Traité de l'Extradition* (Paris, 1874), pp. 94-100; Ludovic Beauchet, *Traité de l'Extradition* (Paris, 1899), pp. 268-278.

²⁸ Art. 4, Treaty between Colombia and Panama, Dec. 24, 1927. 87 L.N.T.S. 409.

²⁹ A number of treaties allow extradition for military offenses if extradition could have been granted for the same act, had it been committed by a person not subject to military law. Harvard Research Draft, *loc. cit.*, p. 121. For a list of treaties containing this provision, see *ibid.*, note 3.

demand for his extradition, would undoubtedly raise: the argument that his crimes constitute a political offense for which extradition cannot be granted. It matters little whether the prohibition of extradition for political crimes is a postulate of universal international law, as some have declared,³⁰ or whether it is merely to be observed when present in a statute or treaty. The existence of the rule must be taken for granted, as this prohibition is stipulated in all extradition treaties and in most extradition acts.³¹

What constitutes a political offense? A wide difference of concepts prevails. A French ministerial circular considers those persons as political offenders, "who have been influenced solely by political passion to break the law."³² More objective definitions are suggested by Fiore and von Liszt. Fiore sees in political offenders persons who

... cause trouble to the order established by the fundamental laws of the state, to the distribution of power, to the rights of the citizen, to the social order and to the rights and duties which result therefrom.³³

Liszt finds political crimes to be

... all premeditated crimes against the existence and the security of the criminal's own or a foreign state. Also, attacks against the head of the Government and the rights and liberties of the citizen.³⁴

And the Harvard Research Draft speaks of

... treason, sedition and espionage ... (and) any offense connected with the activities of an organized group directed against the security or the governmental system of the requesting State. . . .³⁵

The official voices of the states and their courts are more cautious. In most extradition treaties and laws the nature of the political crime re-

³⁰ Heinrich Lammasch, *Austlieferungspflicht und Asylrecht* (Leipzig, 1887), p. 254.

³¹ Not stipulated in Art. 13, Italian Penal Code of 1930, but the prohibition of surrendering political offenders is contained in practically all extradition treaties to which Italy is a party. No prohibition is contained in the law of the Soviet Union. See Law of Oct. 31, 1924, Art. 16, *Sobraniye Zakonov i Rasporashenii*, Dec. 6, 1924, pp. 16 ff. See also T. A. Taracouzio, "International Cooperation of the U.S.S.R. in Legal Matters," this JOURNAL, Vol. 31 (1937), pp. 55 ff. But compare Art. 129 of the Soviet Constitution of 1936 which promises asylum to "foreign citizens persecuted for defending the interests of the toilers, or for their scientific activities, or for their struggle for national liberation."

³² "Circulaire adressé aux services pénitentiaires," issued by M. Barthou, quoted by N. F. A. Donnedieu de Vabres, *Les principes modernes du droit pénal international* (Paris, 1928), p. 277.

³³ Pasquale Fiore, *Traité de droit pénal international et de l'extradition* (Paris, 1880, French translation by F. Antoine), Vol. II, p. 592.

³⁴ Franz von Liszt, *Lehrbuch des deutschen Strafrechts* (18th ed., Berlin, 1911), p. 115.

³⁵ Harvard Research Draft, *loc. cit.*, pp. 112 ff.

mains undefined. Only the German Extradition Act of 1929 attempts a definition:

Political acts are punishable offenses aimed directly (*unmittelbar*) at the existence or the security of the state, against the head or a member of the government, against an institution or a corporation established by the constitution, against the rights of citizens in electing or voting, or against the good relations with foreign states.³⁶

But on the other hand a British Chief Justice, Lord Denman, voiced the prevailing opinion in a leading case:

I do not think it necessary or desirable that we should attempt to put into language in the shape of an exhaustive definition, exactly the whole state of things, or every state of things, which might bring a particular case within the description of an offense of a political character.³⁷

The reluctance of the states to define precisely the nature and scope of the political offense is understandable in view of the rapidly changing political picture in the world, and the unforeseeable nature of future political combat methods. Moreover the states, while trying to present a picture of absolute impartiality, actually often differentiate between political régimes which they consider oppressive, and those which they find similar to their own.³⁸ Practically all extradition treaties, therefore, merely contain a provision prohibiting extradition for political crimes without attempting any definition.

Not only is the fugitive protected against extradition when charged with a purely political crime,³⁹ but also when charged with a so-called relative political offense, *i.e.*, an offense constituting both a common crime and a political act.⁴⁰

³⁶ Act of Dec. 23, 1929, *Reichsgesetzblatt*, 1929, Vol. I, Pt. I, p. 239.

³⁷ In re Castioni, [1891] 1 Q.B. 149.

³⁸ Compare for instance the opinions of the Swiss Federal Tribunal in the cases of Kerreselidze and Magaloff, *Entscheidungen* (1907), Vol. 33 (I), p. 169, and Jaffai, *Entscheidungen* (1901), Vol. 27 (I), p. 52. In the former case the court, in refusing extradition to Russia, bore in mind the oppressive methods which that government employed in Georgia. But in the Jaffai case, the court held that the personal character, as well as the manner of governing by the assassinated King Humbert I of Italy was such that there could be no possible justification for the crime. See Roger Corbaz, *Le Crime Politique et la Jurisprudence du Tribunal Fédéral Suisse en matière d'Extradition* (Lausanne, 1927), p. 139, note.

³⁹ An act which renders the perpetrator liable to penal sanction solely because of its political character.

⁴⁰ Some publicists make a further distinction between the complex crime (*délit complexe*), where both the common and the political crimes are committed by the same act, and the connected crime (*délit connexe*), consisting of two separate acts connected with each other. See Albert Billot, *Traité de l'Extradition* (Paris, 1874), pp. 104 ff.; Paul Bernard, *Traité théorique et pratique de l'Extradition* (Paris, 1890), Vol. II, p. 272.

While the relative political crime has remained as officially undefined⁴¹ as the purely political deed, the states differ widely as to the connection required between political act and common crime in order to put the "political" stamp on the entire action and render it unextraditable. While British and, particularly, American jurisdiction have been satisfied with almost any kind of connection between common and political crime,⁴² other countries, especially Switzerland,⁴³ have insisted on a much more severe test. Swiss practice, the most extensive among all countries, demands not only that the connection between the two elements of the crime be direct and immediate,⁴⁴ but also that the political element should weigh more heavily than the common crime.⁴⁵ Swiss courts have always insisted that the means employed in committing a relative political offense must not be out of proportion to the desired aim.

For a common crime to be classed as a predominantly political offense it is not enough that it has political motive and object, or that it is capable of realizing or furthering that object. The practice of the court has always required in addition a certain relationship between the objective and the means selected for its realization; a relationship of such nature that the idealistic motives connected with the objective are strong enough to let the injury or threat to private and personal rights appear if not as justified, so at least as excusable.⁴⁶

How does all this affect the case of a fugitive war criminal whose extradition is demanded? As far as those acts are concerned which in the recent Nuernberg trials were termed "crimes against peace,"⁴⁷ i.e., acts which led to the outbreak of World War II, there can be little doubt that they constitute purely political offenses which, according to the extradition laws, treaties and practice of all countries, exclude any possibility of extradition. Somewhat different is the case of those atrocities which have been termed "crimes against humanity." Insofar as those acts were committed

⁴¹ Here again the German Extradition Act attempts a definition. It is described as an act so connected with a purely political offense as to be "destined to secure, cover or conceal (it)." Art. 3, Sec. 1.

⁴² Case of the Mexican Revolutionists, U. S. Foreign Relations (1880), p. 788; Case of Cazo, Moore, *op. cit.*, Vol. I, p. 325; Case of Rudewitz, Hackworth, Digest of International Law (Washington, 1940-44), Vol. IV, pp. 49 ff. A particularly feeble link appeared in the Lynchhaun case, *An Irish-American Victory over Great Britain* (Indianapolis, 1903), pp. 112 ff.

⁴³ Sweden is in the same category, having adopted the Swiss system of weighing predominance in relative political crimes. Act of June 4, 1913, Art. 7.

⁴⁴ Case of Kerreselidze and Magaloff, *supra*; Case of Belenzow, *Entscheidungen* (1906), Vol. 32 (I), p. 531.

⁴⁵ Swiss Extradition Act, Art. 10.

⁴⁶ Identical wording in the cases of Vogt, *Entscheidungen* (1924), Vol. 50 (I), p. 249, and Kaphengst, *Entscheidungen* (1930), Vol. 56 (I), p. 457.

⁴⁷ See Charter of the International Military Tribunal, this JOURNAL, Supp., Vol. 39 (1945), p. 258.

by subordinate organs and local commanders out of sadism and hatred, or for reasons of vengeance and greed, they might well be considered non-political and therefore extraditable. But those high officers of government who caused these crimes to be committed for a political reason, no matter how perverse and repugnant to civilization, would find themselves extraditable according to the laws and treaties of some countries, and unextraditable according to those of others. In the majority of states it is stipulated that persons accused of political crimes or of offenses connected therewith shall not be surrendered.⁴⁸ Where this principle is not further modified, as for instance in the Anglo-American countries,⁴⁹ a fugitive who could prove that his deed was actually connected with a political element could not be extradited. Since 1930 some attempts have been made to exclude so-called "acts of terrorism" from consideration as political offenses or acts connected therewith, but only a few countries have adopted these rules;⁵⁰ and the ambitious attempt of the League of Nations to create a general convention providing, among other things, for the extradition of terrorists⁵¹ did not obtain ratification.

On the other hand, Swiss law and procedure could allow extradition on this count, since the Federal Tribunal might well find that such crimes as the extermination of millions of people had a character of such atrocity as to be entirely out of proportion to any political purpose which the perpetrator might have had in mind.⁵²

It would therefore seem that an international court of the Nuernberg type would find it extremely difficult to obtain the extradition of a war criminal from a neutral state unless that state is prepared to enter into a new

⁴⁸ Argentine Extradition Act of Aug. 25, 1885, Art. 3, Sec. 2; Turkish Penal Code, Art. 9; British Extradition Act of 1870, Art. 3, Sec. 1; Belgian Extradition Act of Oct. 1, 1833, Art. 6.

⁴⁹ Extradition Treaty between the United States and Great Britain, Dec. 22, 1931 (U. S. Treaty Series, No. 849), Art. 6.

⁵⁰ Especially Rumania, whose policy in this respect was influenced by Professor Vespasian Pella, one of the prime protagonists of the unification of criminal law and the fight against international terrorism. See the Acts of the Conferences for the Unification of Penal Law at Brussels (1930), Paris (1931), Madrid (1933), and Copenhagen (1935). See also Radu Meitani, "*L'Extradition dans les nouveaux codes Roumains*," *Revue de Droit International et de Législation Comparée* (1937, 3ème série), Vol. 18, pp. 34, 50 ff.; and the treaties between Panama-Colombia (1927), 87 L.N.T.S. 410; Bulgaria-Spain (1930), 114 L.N.T.S. 43; Italy-Panama (1930), 114 L.N.T.S. 241.

⁵¹ Convention for the Prevention and Punishment of Terrorism, League of Nations, *Proceedings of the International Conference on the Repression of Terrorism*, Geneva, Nov. 1-16, 1937 (C.49. M.47. 1938. V.), Art. 8, Secs. 1 and 4. Compare the *Report of the International Law Association*, 35th Report (Warsaw, 1928), p. 32, Art. 7 as amended.

⁵² Cf. Cases of Jaffai, Belenzow, Vogt, Kaphengst, cited *supra*; Wassilieff, *Entscheidungen* (1908), Vol. 24 (I), p. 549; the French Extradition Act of March 10, 1927, Art. 5, Sec. 2, par. 2; also Resolutions of the Institute of International Law, Geneva, 1892, *Annuaire*, Vol. 12, p. 182.

extradition agreement.⁵³ Yet even that course is denied to such states as Sweden and Switzerland which are bound by their own extradition Acts and cannot enter into an agreement of that kind without making legislative changes.

Two possible remedies suggest themselves in this situation. The most difficult to obtain, but in every respect the most satisfactory, would be to have the neutral state participate in the trial by supplying one of the members of the bench.⁵⁴ In that way the war criminal would remain within the jurisdiction of the neutral state and no extradition would be necessary. Moreover, a system in which neutral judges were to play an important rôle would seem vastly superior in every respect to a trial of the vanquished by the victors.

The other remedy is expulsion. As all neutral states are surrounded by Allied belligerent nations, this would automatically deliver the fugitive into the hands of his judges.⁵⁵ But it should be pointed out emphatically that expulsion is a poor and dangerous substitute for extradition. Being a matter pertaining solely to the sovereign rights of each state, it deprives the fugitive of all protection other than that which the state in its own magnanimity might choose to grant.⁵⁶ If expulsion as a substitute for extradition became a general practice, it would annul with one stroke all the progress achieved since 1833 in giving protection to political fugitives.⁵⁷ The rule not to deliver up political refugees would then no longer be the "one rule, more than any other, (which) has been observed in modern times by all independent states, both small and great, of the civilized world,"⁵⁸

⁵³ The defense that extradition under such an agreement would constitute an *ex post facto* law would not be successful, since extradition does not imply judicial decision of guilt but merely an act of "judicial aid" to the proper authorities who have jurisdiction over the offense in question.

⁵⁴ Compare the suggestion made by James W. Garner, "Punishment of Offenders against the Laws and Customs of War," this JOURNAL, Vol. 14 (1920), pp. 70 ff.

⁵⁵ Pierre Laval was expelled by Spain (The New York Times, Aug. 1, 1945), and Edda Ciano by Switzerland (*ibid.*, Aug. 18, 1945).

⁵⁶ Technically there is no "right of asylum" for the fugitive under the law of extradition. Only the states have a "right" to accord or refuse extradition according to their laws and treaties. But since most states have adopted the procedure by which their courts will either decide the question of extradition or at least play an important part in that decision, a high degree of protection is actually accorded to fugitives from justice, particularly when a political element is involved.

⁵⁷ The first law definitely prohibiting extradition for political offenses was enacted by Belgium on Oct. 1, 1833. Some writers claim that a French ministerial directive of April, 1832, was actually the first such instance, Heinrich Lammasch, *Das Recht der Auslieferung wegen politischer Verbrechen* (Vienna, 1884), p. 35. It has also been claimed that such a prohibition was already contained in the constitution of the Duchy of Saxony-Meiningen of Aug. 23, 1829, but the evidence does not appear entirely conclusive. See Wolfgang Mettgenberg, "Das erste Verbot der Auslieferung politischer Verbrecher," *Zeitschrift fuer Voelkerrecht* (1928), Vol. 14, p. 239.

⁵⁸ Lord Palmerston in the House of Commons, Feb. 28, 1851, quoted by Lammasch, *op. cit.*, p. 42.

but would sooner or later become purely a matter of political convenience. The temporary benefit of bringing a few war criminals to justice would seem to weigh lightly against such a lasting damage. The remedy obviously lies in better international extradition treaties and agreements concerning the future treatment of war criminals and international terrorists. It cannot be found in subterfuges.

While the situation is difficult for international and inter-Allied authorities who wish to lay their hands on war criminals, the states who desire to bring fugitive war criminals to justice in their own national courts find themselves in a rather similar predicament.

No permanent problem of recognition is involved, as in the case of the Allied Control Commission, since normal diplomatic relations are sooner or later established between all states. But it is quite likely that neutral states might take considerable exception to some of the courts before whom war criminals are being tried. A number of Allied and former satellite states have chosen to establish special courts for the trial of alleged war criminals and collaborationists which, in their summary procedure and attitude, appear to conduct "purges" rather than to extend impartial justice. Many of them are quite reminiscent of Roland Freisler's infamous "People's Court" of the Hitler régime, and interestingly enough often bear the same name. Such courts, operating with varying degrees of political bias and inquisitorial mannerisms, have been established in Austria, Bulgaria, Czechoslovakia, Hungary, Poland and Yugoslavia.⁵⁹ Especially notorious appear to be the purge-courts of Bulgaria and Yugoslavia, and no neutral state can be expected to remain unconcerned about this peculiar type of justice. Particularly Switzerland and Sweden could hardly fail to consider many of these courts "special" within the meaning of Articles 9 and 11 of their respective Extradition Acts.

As neutral states may well object to some of the charges before the International Military Tribunal, because they are neither covered by traditional international law as they understand it, nor by their own laws, so they may equally take exception to some of the charges leveled against war criminals and collaborationists in some countries. For instance, the Austrian law concerning war criminals⁶⁰ lists such flexible offenses as "war-mongering" and politically inspired offenses against human dignity, while the laws of Yugoslav Macedonia have adopted among other charges the crime termed "failure of public officials to exert themselves in order to prevent capitulation of that country in 1941."

In certain cases a further hurdle may appear in the almost universal

⁵⁹ This list is incomplete.

⁶⁰ *Gesetz ueber Kriegsverbrecher*, Sec. 1; *Verfassunguebergangsgesetz*, adopted by the Austrian Cabinet Council, June 26, 1945 (private source).

practice of refusing the extradition of nationals.⁶¹ This would probably also occur in the case of citizens of double nationality, provided one of their nationalities were that of the requested country.⁶² Thus, when Yugoslavia demanded the extradition of General Roatta as a war criminal, the Italian Government refused, and elected to try him in Italy.⁶³

A further problem may also occur in the case of conflicting requisitions from several states, which would occur frequently with regard to war criminals, whose nefarious activities have caused damage in several countries but who are perhaps not important enough to be tried before an international court. A case of this kind involved the former Italian Governor of Dalmatia, Bastianini, whose extradition was demanded from Switzerland by both Italy and Yugoslavia.⁶⁴ In this respect the practice of states differs considerably. Some apply the rule of "first come, first served,"⁶⁵ while others extradite to the country in which the gravest crime has been committed.⁶⁶

Under present legal conditions it is almost impossible to obtain the extra-

⁶¹ The overwhelming majority of nations prohibit the extradition of their nationals outright. Only Great Britain has consistently agreed to surrender them. *Regina v. Nillins*, [1884] 53 L.J.M.C. 157; *Rex v. Godfrey*, [1923] 1 K.B. 24. The United States has sometimes extradited nationals when in the opinion of the courts the treaty in question warranted it. *Charlton v. Kelly*, 229 U. S. 447 (1912). But the majority of treaties entered into by the United States contain the provision that the contracting parties shall not be bound to give up their nationals. This has been interpreted by the U. S. Supreme Court as withholding authority from the Executive to surrender a citizen. *Valentine v. U. S. ex rel. Neidecker*, 299 U. S. 5 (1936). This interpretation is to be regretted and has been widely opposed. See James W. Garner, "Non-Extradition of American Citizens—the Neidecker Case," this JOURNAL, Vol. 30 (1936), p. 480. For a comprehensive treatment of the whole subject, see Robert W. Rafuse, *The Extradition of Nationals* (Urbana, 1939).

⁶² Resolution of the Hungarian Ministry of Justice, *Annual Digest*, 1925/26, No. 228. Even when nationality has been acquired after the commission of the crime, no extradition can be granted. In *re D.G.D.*, Court of Thrace, Greece, *Annual Digest*, 1933/34, No. 141. Particularly objectionable appears to be a decision of the Greek Areopagus in 1929, which ruled that an Albanian national of Hellenic blood could not be surrendered, as he was included in the term "national." *Albania National Case*, *Annual Digest*, 1929/30, No. 178.

⁶³ *The New York Times*, Nov. 17, 19, 1944.

⁶⁴ *Ibid.*, Oct. 5, 1945.

⁶⁵ Art. 10, Treaty between Great Britain and the United States (1931), U. S. Treaty Series, No. 849.

⁶⁶ Art. 14, Sec. 2, Swiss Extradition Act. But due consideration will also be given to the nationality of the accused. A number of treaties provide that in the case of conflicting requisitions, the requested state is free to choose. Treaty between United States and Germany, July 12, 1930, 119 L.N.T.S. 247. If the conflicting requisitions concern the same act, preference is usually given to the country in which the crime was committed. Art. 7, Seventh International Conference of American States, Convention of Montevideo, Dec. 26, 1933; Harvard Research Draft, Appendix III, p. 290.

dition of a fugitive war criminal from a neutral state,⁶⁷ even if the neutral wishes to co-operate, unless resort is taken to dangerous subterfuges, such as expulsion. The uncertainty about the term "war criminal" in international law is thus fully reflected in the law of extradition with regard to those types of offenders. A lasting remedy can only be found in international conventions defining and establishing in law the character of war crimes and settling the question of extradition.

A further hope lies in the possible creation of an international criminal court to which the requested neutral would be a party, not only because the irksome question of extradition would be obviated, but also because a state which may hesitate to deliver an officer of a vanquished state to the courts of the victors, would feel fewer qualms in seeing justice administered by an impartial international tribunal of which the neutral state would be a member. It is therefore perhaps not entirely visionary to hope that the work so promisingly begun by the League of Nations⁶⁸ may be continued and concluded under the auspices of the United Nations.⁶⁹

⁶⁷ The surrender by Sweden to the Soviet Union of numerous Baltic nationals (The New York Times, Jan. 18, 1946) did not constitute extradition, as the fugitives were, at least at the time of their surrender, not charged with any crimes.

⁶⁸ Convention for the Creation of an International Criminal Court, Proceedings of the International Conference on the Repression of Terrorism, cited *supra*, note 51.

⁶⁹ See Art. 13, Charter of the United Nations; also report of 2nd Session of United Nations International Law Commission, this JOURNAL, Supp., Vol. 44 (1950), p. 134, and not thereon by Yuen-li Liang, below, p. 524.

NOTES ON LEGAL QUESTIONS CONCERNING THE UNITED NATIONS

BY YUEN-LI LIANG *

THE SECOND SESSION OF THE INTERNATIONAL LAW COMMISSION: REVIEW OF ITS WORK BY THE GENERAL ASSEMBLY¹

The International Law Commission held its second session at Geneva from June 5 to July 29, 1950. In the course of forty-three meetings, it completed its study of the following three items on its agenda: (1) ways and means for making the evidence of customary international law more readily available; (2) formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal; (3) desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions. The Commission also considered reports submitted by special *rapporteurs* on four other subjects, namely: (1) preparation of a draft code of offenses against the peace and security of mankind; (2) law of treaties; (3) régime of the high seas; (4) arbitral procedure. After a preliminary discussion of these reports, the special *rapporteurs* were requested to continue their work on the subjects and to present further reports at the next session. The actions (including some of an administrative character) taken by the Commission were set forth in a report to the General Assembly.²

At the fifth session of the General Assembly in 1950 the report of the International Law Commission was discussed at length in the Sixth Committee. Upon the recommendation of the Sixth Committee, the General Assembly adopted six resolutions³ regarding the report. Three of the resolutions contain decisions concerning the organization and functioning

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¹ A note on the review by the General Assembly of the work of the first session of the International Law Commission has been published in this JOURNAL, Vol. 44 (1950), pp. 527-542.

² Report of the International Law Commission Covering Its Second Session, June 5-July 29, 1950, General Assembly, 5th Sess., Official Records, Supp. No. 12 (A/1316); this JOURNAL, Supp., Vol. 44 (1950), pp. 105-148.

³ General Assembly resolutions 484 (V), 485 (V), 486 (V), 487 (V), 488 (V) and 489 (V), adopted on Dec. 12, 1950. See Resolutions adopted by the General Assembly during the period Sept. 19 to Dec. 15, 1950, General Assembly, 5th Sess., Official Records, Supp. No. 20 (A/1775), pp. 76-78.

of the International Law Commission (review by the International Law Commission of its Statute, subsistence allowance for the members, and extension by two years of the term of office of the present members), while the other three resolutions deal with the above-mentioned subjects on which final action was taken by the International Law Commission at its second session. The present note will be confined to these latter subjects.⁴

I. WAYS AND MEANS FOR MAKING THE EVIDENCE OF CUSTOMARY INTERNATIONAL LAW MORE READILY AVAILABLE

This subject was taken up by the International Law Commission in pursuance of Article 24 of its Statute which provides:

The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.⁵

At its first session, the International Law Commission discussed the question on the basis of a memorandum submitted by the Secretary General,⁶ and thereafter invited its chairman, Mr. Manley O. Hudson, to prepare a working paper on the subject. This working paper was studied by the Commission at its second session and became, with slight changes, Part II of the Commission's report to the General Assembly.⁷

In the Sixth Committee attention was mainly given to the practical recommendations submitted by the Commission in this part of its report, but in the course of the discussion some questions of a theoretical character were also touched upon.

The International Law Commission had not found it necessary, for its present purpose, to give a precise definition of customary international law. The Commission had, however, included in its report a few observations on the "scope of customary international law," and some of its statements in that connection gave rise to criticism. In paragraph 29 of the report, it was suggested that "the differentiation between conventional international law and customary international law ought not to be too rigidly insisted upon." And the paragraph continued:

A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue

⁴ The four topics which were referred back by the International Law Commission to the special *rapporteurs* were not discussed at the fifth session of the General Assembly.

⁵ U.N. Doc. A/CN.4/4, p. 7; this JOURNAL, Supp., Vol. 42 (1948), p. 7.

⁶ U.N. Doc. A/CN.4/6.

⁷ Report of the Commission on Its Second Session, U.N. Doc. A/1316, pp. 4-10; this JOURNAL, Supp., Vol. 44 (1950), pp. 111-125.

to be binding as a principle or rule of customary international law for other States. Indeed, not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law. For present purposes, therefore, the Commission deems it proper to take some account of the availability of the materials of conventional international law in connexion with its consideration of ways and means for making the evidence of customary international law more readily available.⁸

While no objection was raised in the Sixth Committee to considering, as a matter of practical convenience, the availability also of materials of conventional international law, some representatives took exception to the theoretical views expressed in paragraph 29 concerning the relation between conventional and customary international law. The representative of Israel contended that the Commission had failed to draw the full conclusions of its statement that a rule of customary international law embodied in an agreement between states continued to be binding on non-contracting states after the expiration of the agreement. The full conclusion would be that the rule, as customary law, continues to be binding also on the contracting states despite the fact that the agreement has lapsed. When this logical conclusion was drawn, "it was easy," he said, "to see the dangerous implications of such sweeping statements."⁹ The Israeli representative further criticized the Commission's view that multipartite conventions which have been signed but not brought into force are frequently regarded as having value as evidence of customary international law. He found the statement misleading and referred, in refutation, to the example of the unratified London Declaration of 1909 concerning the Laws of Maritime War. In 1916 the Privy Council in the prize case of *The Hakan*, and, in 1940, the British Government in connection with the *Asama Maru* incident, had denied the validity of the Declaration as an international instrument or as authority.¹⁰

The representative of Peru also considered that the International Law Commission had gone too far in assimilating conventional and customary international law. He declared that "in view of the position taken by the International Law Commission in paragraph 29 of its report, it was necessary for the Sixth Committee to agree on precise principles concerning that important question," and he indicated what, in his opinion, should be the general trend of these principles by saying that "the distinction between conventional international law and customary international law should be emphasized."¹¹

⁸ U.N. Doc. A/1316, p. 4; this JOURNAL, Supp., Vol. 44 (1950), pp. 112-113.

⁹ General Assembly, 5th Sess., Official Records, Sixth Committee, p. 122.

¹⁰ *Ibid.*, pp. 121-122.

¹¹ *Ibid.*, p. 129.

Another statement of the International Law Commission regarding the "scope of customary international law" which drew critical comment in the Sixth Committee is contained in paragraph 30 of the report which reads:

Article 24 of the Statute of the Commission seems to depart from the classification in Article 38 of the Statute of the [International] Court [of Justice], by including judicial decisions on questions of international law among the evidences of customary international law. The departure may be defended logically, however, for such decisions, particularly those by international courts, may formulate and apply principles and rules of customary international law. Moreover, the practice of a State may be indicated by the decisions of its national courts.¹²

In the opinion of the representatives of India and of France, this paragraph gave an erroneous interpretation to Article 38 of the Statute of the International Court of Justice, in that it seemed to imply that this article did not include judicial decisions on questions of international law among the evidence of customary international law. The representative of India said that the fact that Article 38 referred to international custom and juridical decisions in different subparagraphs did not mean that the Court was not required to treat judicial decisions as evidence of customary international law. International custom was not the same as customary international law; it could serve as evidence of such law, but so could judicial decisions which were based on treaties, rules of customary international law or general principles of law recognized by civilized nations.¹³

The representative of France observed that Article 38

enumerated the different sources of international law, listing first the three categories of sources which really created law—conventions, custom and generally recognized principles of law—and then the subsidiary sources such as judicial decisions and teachings of the most outstanding publicists of the nations.¹⁴

In his opinion there was therefore "no inconsistency between that classification and Article 24 of the Commission's Statute."¹⁵

The majority of the representatives did not consider it necessary for the Sixth Committee to take any definite position with respect to these disputed questions. The practical task of finding ways and means for making the evidence of customary international law more readily available could be ac-

¹² U.N. Doc. A/1316, pp. 4-5; this JOURNAL, Supp., Vol. 44 (1950), p. 113.

¹³ General Assembly, 5th Sess., Official Records, Sixth Committee, p. 119.

¹⁴ *Ibid.*, p. 120. He also noted that in the French text of Art. 38 the words *moyen auxiliaire*, being in the singular, seemed to refer only to *doctrine des publicistes* and not to *décisions judiciaires*. He thereby apparently implied that it could be argued that Art. 38 listed judicial decisions as a principal source of law and considered teachings of publicists only as a subsidiary source.

¹⁵ *Ibid.*

complished without a previous agreement on a precise definition of customary international law or on the solution of similar theoretical problems. In its report to the General Assembly, the Sixth Committee therefore stated that

Decisions by the Sixth Committee on the practical recommendations put forward by the International Law Commission in part II of its report should, therefore, not be taken to imply approval of statements of a theoretical or general character made by the Commission in this connexion.¹⁶

The practical recommendations submitted by the International Law Commission in paragraphs 90-94 of its report,¹⁷ were on the whole favorably received in the Sixth Committee. It was, however, felt that the financial and administrative implications of this program of work needed clarification. The Sixth Committee therefore proposed that the General Assembly should invite the Secretary General to consider and report to it upon the recommendations contained in paragraphs 90, 91 and 93 of the report of the International Law Commission in the light of the discussion held and the suggestions made thereon in the Sixth Committee. This proposal was accepted by the General Assembly.¹⁸

Paragraphs 90, 91 and 93 of the report of the International Law Commission contain the following recommendations:

(1) That the widest possible distribution be made of publications relating to international law issued by organs of the United Nations, particularly the *Reports* and other publications of the International Court of Justice, the *United Nations Treaty Series* and the *Reports of International Arbitral Awards*;

(2) That the General Assembly should authorize the Secretariat to prepare and issue:

- (a) a Juridical Yearbook;
- (b) a Legislative Series containing the texts of current national legislation on matters of international interest;
- (c) a collection of the constitutions of all States;
- (d) a list of the publications issued by the Governments of all States containing the texts of treaties concluded by them, supplemented by a list of the principal collections of treaty texts published under private auspices;
- (e) a consolidated index of the *League of Nations Treaty Series*;
- (f) occasional index volumes of the *United Nations Treaty Series*;
- (g) a *répertoire* of the practice of the organization of the United Nations with regard to questions of international law;
- (h) additional series of the *Reports of International Arbitral Awards*.

¹⁶ U.N. Doc. A/1639, p. 7.

¹⁷ U.N. Doc. A/1316, p. 10; this JOURNAL, Supp., Vol. 44 (1950), pp. 124-125.

¹⁸ General Assembly resolution 487 (V) of Dec. 12, 1950.

(3) That the General Assembly should call to the attention of Governments the desirability of their publishing digests of their diplomatic correspondence and other materials relating to international law.

The recommendations made in paragraphs 92 and 94 were not among those referred to the Secretary General for consideration and report. It was considered that the suggestion contained in paragraph 92 that the Registry of the International Court of Justice should publish occasional digests of the Court's *Reports* was superfluous as such digests were already published in the Court's *Yearbook*. The recommendation in paragraph 94 that the General Assembly should give consideration to the desirability of an international convention concerning the general exchange of official publications relating to international law and international relations was supported by several representatives in the Sixth Committee, but the majority view was that the question was not yet ripe for decision.¹⁹

II. FORMULATION OF THE NÜRNBERG PRINCIPLES

On December 11, 1946, the General Assembly adopted resolution 95 (I) by which it affirmed the principles of international law recognized by the Charter and Judgment of the International Military Tribunal at Nürnberg, established by an agreement between France, the Soviet Union, the United Kingdom and the United States, signed on August 8, 1945. By its resolution 177 (II) of November 21, 1947, the General Assembly directed the International Law Commission (a) to formulate these principles (the so-called Nürnberg principles), and (b) to prepare a draft code of offenses against the peace and security of mankind, indicating clearly the place to be accorded therein to the said principles.²⁰

At its first session in 1949, the International Law Commission undertook a preliminary consideration of these two closely interrelated questions and appointed Mr. J. Spiropoulos *rapporteur* for both of them. Mr. Spiropoulos submitted separate reports on the two subjects at the Commission's second session in 1950. On the basis of his report on the Nürnberg principles,²¹ the Commission formulated these principles and submitted its formulation in Part III of its report to the General Assembly.²² The Commission also made substantial progress in its work on the draft code as set forth in Part V of its report.²³

¹⁹ Report of the Sixth Committee, U.N. Doc. A/1639, pp. 7-8.

²⁰ For the history of these General Assembly resolutions, see the memorandum of the Secretary General, entitled "The Charter and Judgment of the Nürnberg Tribunal; History and Analysis" (U.N. Doc. A/CN.4/5), pp. 11-33. The charter and the judgment of the Nürnberg Tribunal are included in Vol. I of the official record of the Nürnberg trial published under the title "Trial of the Major War Criminals before the International Military Tribunal, Nürnberg, 14 November 1945-1 October 1946."

²¹ U.N. Doc. A/CN.4/22.

²² U.N. Doc. A/1316, pp. 11-14; this JOURNAL, Supp., Vol. 44 (1950), pp. 125-134.

²³ *Ibid.*, pp. 17, 137-139, respectively.

The discussion in the Sixth Committee revealed a wide divergence of views regarding the principles formulated by the Commission. Contradictory opinions were expressed on nearly every important issue raised in the course of the debates. Within the limits of this note it is not possible to give a full picture of these prolonged and complicated discussions, but some of the more significant problems and opinions will be reviewed below.

A. LEGAL CHARACTER OF THE NÜRNBERG PRINCIPLES AND EFFECT OF THE
GENERAL ASSEMBLY'S AFFIRMATION OF THE PRINCIPLES

In its judgment the Nürnberg Tribunal made the general statement that its charter was the expression of international law existing at the time of its creation and was to that extent itself a contribution to international law.²⁴ The Tribunal also presented specific legal arguments for the purpose of showing that aggression and war crimes were already crimes under international law at the outbreak of the second World War.²⁵

The International Law Commission did not express any opinion on the legal character of the Nürnberg principles, as it considered that its task was merely to formulate them.²⁶

In the Sixth Committee several representatives strongly supported the opinion of the Nürnberg Tribunal that its charter was based on already existing international law. According to the representative of France, "the charter and judgment of Nürnberg had created no new international law, but had merely embodied already accepted principles, or principles already implicit in the conduct of States."²⁷ This view had, in his opinion, been tacitly accepted by the General Assembly which had affirmed the principles of international law *recognized* by the Charter of Nürnberg, not the principles *laid down* by that charter.²⁸ The representative of Israel also found it "obvious that the recognition of principles logically implied that they had existed previously."²⁹ Similarly the Yugoslav representative declared that the legal principles stated in the Charter and Judgment of Nürnberg "had already been an integral part of international law at the time."³⁰ The same trend of thought was also discernible in the speeches of the Soviet, Polish and Czechoslovak representatives.³¹

The contrary view was emphatically expressed by the representative of Mexico. In his opinion "there was no doubt that the charter and judgment created new concepts in the field of international criminal law, some of which were in contradiction with the rules and principles prevailing prior

²⁴ Trial of the Major War Criminals, Vol. I, p. 218; this JOURNAL, Vol. 41 (1947), p. 216.

²⁵ Trial of the Major War Criminals, Vol. I, pp. 219-222 and 253-254.

²⁶ U.N. Doc. A/1316, p. 11; this JOURNAL, Supp., Vol. 44 (1950), pp. 125-126.

²⁷ General Assembly, 5th Sess., Official Records, Sixth Committee, p. 169.

²⁸ *Ibid.*, p. 170.

²⁹ *Ibid.*, p. 175.

³⁰ *Ibid.*, p. 150.

³¹ *Ibid.*, pp. 156, 177 and 187, respectively.

to the time that they were proclaimed," and he added that "the fact that the General Assembly . . . had affirmed the Nürnberg principles did not prove that they had already been established as recognized principles of international law."³² The representative of Argentina emphasized that the General Assembly "had merely confirmed the principles of international law recognized in the charter and judgment of Nürnberg" and drew the conclusion that the General Assembly "had not confirmed all the principles acknowledged at Nürnberg."³³

The representative of Pakistan took a similar stand. He thought it doubtful whether the charter merely codified existing international law, and contended moreover that the discussions in the Sixth Committee and in the plenary meetings of the General Assembly in 1946 clearly showed that "neither the (Sixth) Committee nor the (General) Assembly had decided what principles of the charter and judgment of the Nürnberg Tribunal should be formulated." In any case he considered that "the affirmation of the principles of the Nürnberg charter and of the judgment of the Nürnberg Tribunal by the General Assembly could not result in the incorporation of those principles in international law."³⁴

The Netherlands representative also doubted that all the Nürnberg principles were international law. In his opinion, the "fundamental Nürnberg principles were not questioned," but he thought that "the charter had been drafted in haste" and that "some of its provisions had later proved inadequate."³⁵ The arguments put forth by the Tribunal had not convinced him that aggression was an international crime in 1939.

The representative of the United Kingdom was inclined to agree with the Netherlands representative that it was extremely doubtful whether in 1939 aggressive war had constituted *per se* a crime under international penal law. The same was true with regard to crimes against humanity. And he went on to state more generally: "The Nürnberg principles owed their existence as recognized principles of international law to the fact that they were embodied in the Nürnberg charter itself and not to any prior acceptance."³⁶ As these statements seemed to imply that in his opinion the Charter of the Nürnberg Tribunal went beyond the international law existing at the time of its creation, he later made the following clarifying declaration:

Some representatives thought that he had questioned the validity of the charter of Nürnberg and that he allowed it to be understood that the victor had laid down the law for the vanquished. He had never upheld such a theory. He had merely stated that he was not certain whether, before the war—that is to say in 1939 and not in 1945—some concepts had formed a definite part of international law. . . . In his view, what had happened was that, between 1939 and 1945, concepts of

³² *Ibid.*, p. 145.

³³ *Ibid.*, p. 166.

³⁴ *Ibid.*, p. 174.

³⁵ *Ibid.*, p. 137.

³⁶ *Ibid.*, p. 143.

aggressive wars and offences against peace and humanity which had hitherto existed only as concepts, had become definite rules of law accepted by all civilized nations. The charter and judgment of Nürnberg were based on those rules and he had never wished to imply that these instruments had no juridical foundation.³⁷

The United Kingdom representative thus came finally to confirm the opinion of the Tribunal that its charter expressed existing international law. At the same time, he attributed great importance to the General Assembly's affirmation of the Nürnberg principles. He said in that connection:

Whatever views might be taken about the situation before the charter of Nürnberg, the existing position was perfectly clear and no one doubted that the Nürnberg principles had become recognized principles of international law. The affirmation by the General Assembly was sufficient to make them so, as far as the Member States of the United Nations were concerned.³⁸

B. TERMS OF REFERENCE OF THE COMMISSION

At its first session in 1949 the International Law Commission took two important decisions by which it interpreted its terms of reference and determined the scope of its task with respect to the Nürnberg principles. In the first place, the Commission came to the conclusion—as has been mentioned above—that since the Nürnberg principles had been affirmed by the General Assembly in resolution 95 (I) of December 11, 1946, the task of the Commission was not to express any appreciation of these principles but merely to formulate them.³⁹ Secondly, the Commission decided that its mandate was to formulate these principles only and not the general principles of international law underlying the Charter and Judgment of Nürnberg. The terms of reference were again discussed at the second session and the sense of the Commission was that it should adhere to the previous decisions.⁴⁰

In the Sixth Committee, the representative of France sharply criticized the International Law Commission's interpretation of its terms of reference. He asserted that it had been the Commission's duty to determine the juridical character of the Nürnberg principles.⁴¹ Thereby he did not mean, however, that the Commission ought to have exercised an independent judgment in the matter and should have submitted to the General Assembly a legal opinion on the question whether or not the Nürnberg principles were principles of international law. In a later statement he declared that the French Delegation

³⁷ *Ibid.*, p. 181.

³⁸ *Ibid.*, p. 143.

³⁹ Report on the First Session (U.N. Doc. A/925), p. 4; this JOURNAL, Supp., Vol. 44 (1950), p. 9.

⁴⁰ Report on the Second Session, U.N. Doc. A/1316, p. 11; this JOURNAL, Supp., Vol. 44 (1950), pp. 125-126.

⁴¹ General Assembly, 5th Sess., Official Records, Sixth Committee, p. 141.

was not asking that the International Law Commission should consider the principles of the charter and judgment of Nürnberg to see if they constituted principles of existing international law, because that question had already been decided in the affirmative. His delegation had simply asked that the study and formulation of the principles contained in the charter should be exhaustively pursued.⁴²

His opinion seems therefore to have been that the International Law Commission should have expressly stated that the Nürnberg principles were firmly based on already existing principles of international law and that the Commission should thereafter have proceeded to formulate all these principles, not only the principles of the charter and judgment but also the underlying, wider principles of international law. He said:

The task entrusted to the Commission had not been to provide historical commentaries on the charter and judgment, or to throw some light on separate points contained therein, but to establish the underlying principles with a view to assisting the future development of international penal law.⁴³

The representative of Argentina also criticized the International Law Commission for its failure to express any appreciation of the Nürnberg principles as principles of international law. His reasons were, however, quite different from those of the French representative. As has been indicated above, the representative of Argentina considered that the General Assembly had affirmed only those principles contained in the Charter and Judgment of the Nürnberg Tribunal which were principles of international law. In his opinion the International Law Commission should therefore have examined the Nürnberg principles from that point of view and ascertained to what extent they were founded in international law.⁴⁴

The Netherlands representative held that the International Law Commission, instead of reproducing a number of concrete provisions from the charter, should have limited its formulation to a few fundamental and very general principles.⁴⁵ His view on the matter of method was obviously strongly influenced by the fact that he had serious objections against some of the provisions in the charter.

The Commission's interpretation of its terms of reference was, however, supported by the majority of delegations.⁴⁶ They felt that the International Law Commission had acted wisely and in conformity with the instructions given by the General Assembly when it had confined itself to a mere formulation of the Nürnberg principles without expressing a view on the legal character of these principles. In their opinion, the Commission

⁴² *Ibid.*, p. 170.

⁴³ *Ibid.*, p. 141.

⁴⁴ *Ibid.*, p. 166.

⁴⁵ *Ibid.*, p. 137.

⁴⁶ *E.g.*, Afghanistan, *ibid.*, (p. 189), Australia (p. 169), Brazil (p. 132), China (p. 164), Czechoslovakia (p. 187), Greece (p. 152), Iran (p. 160), Mexico (p. 145), Soviet Union (p. 156), Syria (p. 159), United Kingdom (pp. 143-144), Uruguay (p. 154), and Venezuela (p. 165).

had also been correct in assuming that its task was to formulate the principles contained in the charter and judgment, not the underlying general principles of international law.

On one point there was no opposition in the Sixth Committee against the interpretation placed by the International Law Commission on its terms of reference. The Commission had stated in Part V of its report that, in its opinion, resolution 177 (II) did not preclude it from suggesting modification or development of the Nürnberg principles for the purpose of their incorporation in the draft code of offenses against the peace and security of mankind.⁴⁷ The sense of the Sixth Committee was unmistakably that the International Law Commission should be allowed the greatest freedom of action in this respect.

C. FORMULATION OF PARTICULAR PRINCIPLES

(a) *Principles I and II*

Principle I that "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment," and Principle II that "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law," raised the two fundamental and closely connected problems regarding the position of the individual in international law and the relation between internal and international law. In its commentary to the principles, the International Law Commission had declared that they implied first that international law may impose duties on individuals directly without any interposition of internal law, and, secondly, that international law held supremacy over internal law.⁴⁸

In the Sixth Committee the representative of the United Kingdom declared that his delegation was skeptical about the "fashionable theory" that the individual as well as the state could be held directly responsible under international law. In his opinion international law was and always would be essentially concerned with the relations between states. He agreed that individuals who committed crimes under international law should be tried and punished, but thought that the theory of the international responsibility of the individual was unnecessary for that purpose. All that was necessary was that the states admit that the individuals under their jurisdiction would be subject to punishment for certain acts recognized as crimes under international law.⁴⁹ His view was shared by several other representatives, among them those of Argentina,⁵⁰ Czechoslovakia,⁵¹ and

⁴⁷ Report on the Second Session, U.N. Doc. A/1316, p. 17; this JOURNAL, Supp., Vol. 44 (1950), p. 138.

⁴⁸ *Ibid.*, pp. 11-12, and 127, respectively.

⁴⁹ General Assembly, 5th Sess., Official Records, Sixth Committee, pp. 144-145.

⁵⁰ *Ibid.*, p. 167.

⁵¹ *Ibid.*, p. 187.

Venezuela.⁵² The Belgian delegate also agreed, and warned that "the first principle formulated by the International Law Commission should not lead to the disregard of the habitual machinery for the performance of treaties." He was convinced that "international conventions imposed obligations on the individual only after they had come into effect and had thus become an integral part of national law."⁵³

The contrary view was defended by the representative of Brazil. In his opinion, the concept of individual responsibility was essential in international criminal law. This principle must be recognized or "all hope must be abandoned for organizing international punishment of certain acts committed by individuals."⁵⁴ Supported by the representative of Uruguay,⁵⁵ he protested against the characterization as a passing fashion of a theory which had been adopted by many eminent jurists.⁵⁶ The representatives of France,⁵⁷ and of Israel⁵⁸ also supported the recognition of the responsibility of the individual under international criminal law.

Several representatives declared that they could not accept the idea of the supremacy of international over national law. The representative of Egypt pointed out that it was in contradiction with the constitutions of many states.⁵⁹ The Belgian representative feared that "in the completely general form in which the International Law Commission had stated it" the principle might "lead to very serious practical difficulties."⁶⁰ The representative of Peru said that "the principle of the supremacy of international law was only one doctrine amongst many,"⁶¹ while the Argentine representative contended that the said principle "had not yet been recognized as a principle of positive international law," and declared that it was not acceptable to his government.⁶² A similar reservation was made by the representative of the Dominican Republic.⁶³

(b) *Principle III*

In Principle III, based on Article 7 of the Nürnberg Charter, the International Law Commission had formulated the important rule that a perpetrator of an international crime is not relieved from responsibility under international law on the ground that he acted as Head of State or responsible government official. The principle refuted the theory, relied on by the defendants in the Nürnberg trial, that individuals are not responsible for "acts of State," i.e., acts which they committed in their capacity of state organs. The main idea embodied in the principle was not seriously challenged in the Sixth Committee. In its formulation, the International Law Commission had, however, departed from Article 7 of the charter in one respect. Article 7 said that the official position of the defendant should

⁵² *Ibid.*, p. 165.

⁵³ *Ibid.*, p. 162.

⁵⁴ *Ibid.*, p. 133.

⁵⁵ *Ibid.*, p. 155.

⁵⁶ *Ibid.*, p. 145.

⁵⁷ *Ibid.*, p. 142.

⁵⁸ *Ibid.*, p. 175.

⁵⁹ *Ibid.*, p. 156.

⁶⁰ *Ibid.*, p. 162.

⁶¹ *Ibid.*, p. 146.

⁶² *Ibid.*, p. 167.

⁶³ *Ibid.*, p. 161.

not even be a ground for the mitigation of punishment.⁶⁴ The latter provision had been left out by the Commission and this omission was criticized by certain delegations, among them those of Belgium⁶⁵ and The Netherlands.⁶⁶

(c) *Principle IV*

In its formulation of Principle IV regarding the effect of superior orders, the International Law Commission had also departed from the provisions of the charter, in this case its Article 8. This article provided that the fact that a defendant acted under orders of a superior could not free him from responsibility but might be considered in mitigation of punishment.⁶⁷ Principle IV, on the other hand, provided that the fact that a person acted under orders of a superior could not relieve him from responsibility, "provided a moral choice was in fact possible to him."⁶⁸ The difference was that while, according to Article 8 of the charter, superior orders could never free a defendant from responsibility, but could only be a ground for mitigating the punishment, Principle IV relieved a defendant from responsibility if no moral choice was possible to him when he perpetrated his crime. The International Law Commission had based its formulation on a passage in the Judgment of the Nürnberg Tribunal.⁶⁹

In the Sixth Committee opinion was divided on this question. Some representatives, who considered Article 8 of the charter too rigid, thought that the Commission had been justified in modifying the rule on superior orders.⁷⁰ Others found the expression "moral choice" ambiguous⁷¹ or feared that the modification would result in laxity in the prosecution of criminals under international law.⁷²

(d) *Principle V*

The substance of Principle V, which affirmed the right of the defendant to a fair trial, met with general approval within the Sixth Committee. Only some minor points of wording were raised regarding this principle.

(e) *Principle VI*

In the discussion of Principle VI embodying definitions of three international crimes, namely, crimes against peace, war crimes, and crimes

⁶⁴ Trial of the Major War Criminals, Vol. I, p. 12.

⁶⁵ General Assembly, 5th Sess., Official Records, Sixth Committee, p. 162.

⁶⁶ *Ibid.*, p. 138.

⁶⁷ Trial of the Major War Criminals, Vol. I, p. 12.

⁶⁸ U.N. Doc. A/1316, p. 12; this JOURNAL, Supp., Vol. 44 (1950), p. 128.

⁶⁹ *Ibid.*

⁷⁰ See General Assembly, 5th Sess., Official Records, Sixth Committee, p. 163 (Belgium), p. 133 (Brazil), p. 154 (Greece).

⁷¹ *Ibid.*, p. 138 (Netherlands), p. 144 (United Kingdom).

⁷² *Ibid.*, p. 164 (China), p. 188 (Czechoslovakia), p. 175 (Israel), p. 178 (Poland), p. 150 (Yugoslavia).

against humanity, special attention was given to crimes against humanity. Some delegations criticized the Commission for having retained the provision in Article 6 (c) of the Charter of Nürnberg that these crimes could be committed only in connection with crimes against peace or war crimes. The representative of France contended that the Commission had failed to recognize that its task was broader than that of the Nürnberg Tribunal. The Tribunal was competent to take cognizance of crimes against humanity only if they were perpetrated in execution of, or in connection with, crimes against peace or war crimes. But no such limitation had been placed on the competence of the International Law Commission. The Commission had been asked to codify the principles of crimes against humanity. The peculiar characteristic of these crimes was not that they were connected with crimes against peace or war crimes, but that "they were in general committed by governments, or with the complicity or tolerance of governments, so that the only possible form of punishment was on the international level." The concept of crimes against humanity had furthermore been incorporated in the Convention on Genocide which does not contain the limitation laid down in Article 6 (c) of the Nürnberg Charter. It was therefore, in the view of the French representative, contrary to existing international law to state as a principle that crimes against humanity were inseparably linked with crimes against peace or war crimes.⁷³

Other delegations, among them those of Brazil,⁷⁴ Greece,⁷⁵ and Iran,⁷⁶ defended the International Law Commission on this point. In their opinion there were no crimes against humanity generally under international law. These crimes existed only under the Nürnberg Charter and the Commission's definition was therefore correct.

(f) *Principle VII*

The representative of The Netherlands raised strong objections against Principle VII, the last principle of the formulation. In this principle it was stated that complicity in a crime against peace, a war crime or a crime against humanity was also a crime under international law. The Netherlands delegate felt that the principle went too far, as it applied ordinary rules of complicity not only to war crimes and crimes against humanity but also to crimes against peace. He argued that the Nürnberg Tribunal had taken great care to limit the scope of crimes against peace and had convicted only persons in very high positions of this crime. Instead of following that restrictive tendency, the International Law Commission had adopted a formulation by which "not only industrialists, but all workers in munitions factories, not only the chief of staff but also all soldiers in the field from generals to privates, would be considered as criminals."⁷⁷ A contrary opinion was expressed by the Yugoslav representative.⁷⁸

⁷³ General Assembly, 5th Sess., Official Records, Sixth Committee, pp. 141-142 and 170.

⁷⁴ *Ibid.*, p. 133.

⁷⁵ *Ibid.*, p. 153.

⁷⁶ *Ibid.*, p. 160.

⁷⁷ *Ibid.*, p. 172.

⁷⁸ *Ibid.*, p. 151.

D. ACTION TO BE TAKEN ON FORMULATION

With respect to the question what action should be taken by the General Assembly on the International Law Commission's formulation of the Nürnberg principles various procedures were suggested in the course of the deliberations. The Byelorussian Soviet Socialist Republic proposed that the formulation should be referred back to the Commission which would circulate it to the Member States for their comments.⁷⁹ France submitted a draft resolution⁸⁰ requesting the International Law Commission to continue its study of the Nürnberg principles and calling attention to the need of giving, within the framework of this study, a permanent validity to the principles, especially with regard to crimes against humanity as crimes independent of crimes against peace and war crimes. This draft resolution was later replaced by a joint draft resolution⁸¹ presented by Argentina, Denmark, the Dominican Republic, Egypt, France, The Netherlands, Norway, Pakistan, Peru, Sweden and Syria, under which the International Law Commission would be invited to reconsider its formulation of the Nürnberg principles in the light of the observations made thereon by delegations during the fifth session of the General Assembly. The United Kingdom, on the other hand, proposed that the General Assembly should take note of the formulation.⁸²

After lengthy negotiations all the draft resolutions, except that of the Byelorussian Soviet Socialist Republic, were replaced by a new joint draft resolution⁸³ submitted by Argentina, Cuba, Denmark, the Dominican Republic, Egypt, France, Iran, The Netherlands, Norway, Pakistan, Peru, Sweden, Syria, the United Kingdom, the United States and Venezuela. According to this draft resolution the governments of Member States would be invited to furnish their observations on the formulation, and the International Law Commission would be requested, in preparing the draft code of offenses against the peace and security of mankind, to take account both of such observations and of the observations made by delegations during the fifth session of the General Assembly. After the Byelorussian proposal had been defeated by 21 votes to 5, with 15 abstentions,⁸⁴ this joint draft resolution was adopted, with a minor drafting change, by 32 votes to 1, with 8 abstentions.⁸⁵ It was later adopted by the General Assembly by 42 votes in favor, none against, and 6 abstentions.⁸⁶

⁷⁹ U.N. Doc. A/C.6/L.140.

⁸⁰ U.N. Doc. A/C.6/L.141/Rev.1.

⁸¹ U.N. Doc. A/C.6/L.146.

⁸² U.N. Doc. A/C.6/L.142.

⁸³ U.N. Doc. A/C.6/L.149.

⁸⁴ General Assembly, 5th Sess., Official Records, Sixth Committee, p. 194.

⁸⁵ *Ibid.*, p. 198.

⁸⁶ General Assembly, 5th Sess., Official Records, Plenary Meetings, p. 604 (320th meeting, Dec. 12, 1950).

III. QUESTION OF AN INTERNATIONAL CRIMINAL JURISDICTION

By resolution 260 B (III) of December 9, 1948, the General Assembly invited the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions," and requested the Commission, in carrying out its task, to "pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice."

At its first session the International Law Commission appointed Mr. R. J. Alfaro and Mr. A. E. F. Sandström as special *rapporteurs* for this question. The *rapporteurs* submitted at the second session their reports, which presented opposite points of view. Mr. Alfaro in his report⁸⁷ came to the conclusion that it was both desirable and possible to establish an international criminal court. He also thought that it would be possible to create a criminal chamber of the International Court of Justice, subject to the necessity of amending the Statute of the Court in order to allow the Court to try individuals. Mr. Sandström's report⁸⁸ expressed the opinion that in the actual organization of the international community an international criminal court would be impaired by such practical defects that it would do more harm than good. In his view the time was not yet ripe for the creation of such a court.

After consideration of the matter, the International Law Commission, by 8 votes to one, with 2 abstentions, decided that the establishment of an international criminal court was desirable and, by 7 votes to 3, with one abstention, that it was also possible. As to the creation of a criminal chamber within the International Court of Justice, the Commission decided not to recommend that alternative.⁸⁹

In the Sixth Committee the conclusions reached by the International Law Commission were wholeheartedly endorsed by the representatives of Cuba⁹⁰ and France.⁹¹ The delegates from Iran⁹² and Yugoslavia⁹³ also declared themselves in favor of the creation of an international criminal court. On the other hand, the establishment of such a court was strongly opposed by the delegations of Byelorussia,⁹⁴ Poland⁹⁵ and the Soviet Union⁹⁶ on the ground that it would be contrary to the sovereign right of the state to exercise jurisdiction over crimes committed on its territory. The representative of the United Kingdom also took a critical view of the Commission's conclusions but from another angle. He agreed in substance with the

⁸⁷ U.N. Doc. A/CN.4/15.

⁸⁸ U.N. Doc. A/CN.4/20.

⁸⁹ U.N. Doc. A/1316, p. 16; this JOURNAL, Supp., Vol. 44 (1950), pp. 136-137.

⁹⁰ General Assembly, 5th Sess., Official Records, Sixth Committee, p. 200.

⁹¹ *Ibid.*, p. 202.

⁹² *Ibid.*, p. 213.

⁹³ *Ibid.*, p. 207.

⁹⁴ *Ibid.*, p. 228.

⁹⁵ *Ibid.*, p. 226.

⁹⁶ *Ibid.*, p. 223.

opinion expressed by Mr. Sandström and thought that the idea of an international criminal court was not a practical project under present circumstances.⁹⁷ The majority of the delegations, including those of Belgium, Denmark, Egypt, India, Israel, Pakistan, Peru, and the United States, preferred not to express any opinion on the substantive question of the desirability and possibility of such a court.⁹⁸ They felt that the question could not be settled *in abstracto* and did not wish to take any position on the matter until they had before them a draft statute for the court. These delegations therefore supported a draft resolution⁹⁹ submitted jointly by Cuba, France and Iran, in which it was proposed to set up a committee composed of representatives of 17 Member States which should meet in Geneva on August 1, 1951, for the purpose of preparing one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court. It was understood that the setting up of this committee would not commit the governments as to the ultimate desirability and possibility of establishing the court. The committee report would be communicated to the Member States for their comments and the question would thereafter be placed on the agenda of the seventh session of the General Assembly in 1952. This joint resolution was, in substance, adopted by the Sixth Committee by 35 votes to 6, with 8 abstentions,¹⁰⁰ and subsequently by the General Assembly by 42 votes to 7, with 5 abstentions.¹⁰¹

⁹⁷ *Ibid.*, p. 201.

⁹⁸ *Ibid.*, pp. 203, 204, 205, 207, 216 and 224.

⁹⁹ U.N. Doc. A/C.6/L.151/Rev.1.

¹⁰⁰ General Assembly, 5th Sess., Official Records, Sixth Committee, p. 240.

¹⁰¹ General Assembly, 5th Sess., Official Records, Plenary Meetings, p. 604 (320th meeting, Dec. 12, 1950). The following Member States were selected to be represented on the committee: Australia, Brazil, China, Cuba, Denmark, Egypt, France, India, Iran, Israel, The Netherlands, Pakistan, Peru, Syria, the United Kingdom, the United States and Uruguay. Poland and the Soviet Union had declined to participate in the committee.

EDITORIAL COMMENT

GEORGE GRAFTON WILSON
1863-1951

For the first time since THE AMERICAN JOURNAL OF INTERNATIONAL LAW began publication in January, 1907, the name of George Grafton Wilson is omitted from the list of members of the Board of Editors. He died in Cambridge, Massachusetts, on April 30 in his 89th year, the last survivor of the original Editorial Board which included James Brown Scott as Managing Editor, and Charles Noble Gregory, David Jayne Hill, John Bassett Moore, Leo S. Rowe, Robert Lansing, William W. Morrow, Oscar S. Straus and Theodore S. Woolsey. Professor Wilson, then Professor of International Law at Brown University and law lecturer in the United States Naval College, was a member of the Committee on Organization of the American Society of International Law, and was elected a member of the first Executive Council, on which he served for life. In 1923 he became a Vice President and the following year an Honorary Vice President, a position he held at the time of his death.

He succeeded Dr. Scott as Editor-in-Chief of the JOURNAL in 1924. In addition to the usual functions of an editor, the Editor-in-Chief is responsible for the final make-up of each number of the JOURNAL. To maintain its scientific and professional standards and to safeguard the best interests of the Society of which the JOURNAL is the organ, the Editor-in-Chief is vested with the power to veto the publication of any contribution or other material. He passes personally upon the contributions of other members of the Board and is the final arbiter of disagreements between them concerning the publication of articles submitted by non-members. For nineteen years Professor Wilson performed those responsible duties with tact, sound judgment and complete satisfaction. Because of his advancing years he resigned as Editor-in-Chief on May 7, 1943. Following the death of Dr. Scott in June of that year, Professor Wilson was elected Honorary Editor-in-Chief on July 21, 1943.

From the beginning of its publication, Professor Wilson was a constant contributor to the columns of the JOURNAL. He had an article in the first number entitled "Insurgency and International Maritime Law." His last contribution, in October, 1944, was an editorial on "Peace and Security." He was a regular attendant at the Society's annual meetings and actively participated in their proceedings. His last appearance was at the annual dinner on May 1, 1943. Elsewhere in this JOURNAL¹ his many years of service as Professor of International Law at Harvard University and at the

¹ See current note, *post*, p. 549.

Naval War College are described. There he established an enviable reputation as a beloved teacher, personal friend and wise counselor. His success as an author has also been mentioned there, as well as his distinguished services to the Government.

It was the privilege of the undersigned to be associated with Professor Wilson over a long period in the editing of the JOURNAL and in the affairs of the Society, as well as in other activities in which we both took deep interest. He was chairman of the Standing Committee of the American Society of International Law, appointed to make recommendations to the Division of International Law of the Carnegie Endowment for International Peace when it invited the Society's advice and suggestions concerning the increase and advancement of the study and teaching of international law in American institutions of learning. He was a representative of Harvard University in the series of Conferences of Teachers of International Law and Related Subjects which were held at irregular intervals in connection with the Society's annual meetings. He participated in all of these meetings except the eighth and last, held in 1946. At two of them he read papers. At the third, held in 1928, he presented the subject of "The Nature of Research as Distinguished from the Gathering of Information," and at the sixth meeting in 1938 his subject was "War Declared and the Use of Force."

Pursuant to the Society's recommendation, the Carnegie Endowment established in 1917 ten annual fellowships in international law. The awards were made by a committee appointed from the profession outside the Endowment. Professor Wilson served for twenty years as the anonymous Chairman of the Committee on Awards. It was upon his suggestion that the rule was adopted requiring holders of the fellowships to transfer to another college or university for study under the award, in order, as Professor Wilson expressed it, to prevent educational "in-breeding."

When the Harvard Research in International Law was organized in 1929, Professor Wilson was made a member of its Advisory Committee. Later he became a member of its Executive Committee and was Reporter of its Draft Convention and Comment on the subject of Territorial Waters. In 1932 the Division of International Law of the Carnegie Endowment started a series of Summer Sessions on International Law for young teachers and professors in the smaller institutions. Professor Wilson served on the informal council which directed the work and he gave scheduled courses and seminars throughout the whole series of meetings. They were held for eight successive summers at the University of Michigan, the ninth and final session taking place at McGill University in Montreal.

The last volume added to the Carnegie Endowment's "Classics of International Law" was Dana's edition of Henry Wheaton's *Elements of International Law*. Professor Wilson was invited to assume, and accepted, its editorship. The edition of 1866 was literally reproduced, with errors cor-

rected by footnotes of the Editor, leaving the original text undisturbed. Professor Wilson also contributed an admirable introduction on "Henry Wheaton and International Law," and a "Sketch of the Life of Richard Henry Dana, Jr.," and supplied a chronological list of editions and translations of Wheaton's *Elements*.

On the numerous happy occasions when the undersigned was fortunate to have the privilege of working with Professor Wilson, he frequently met many of his former students. Without fail each and every one of them spontaneously expressed his affection and admiration for his former teacher. Even in Manchuria where our paths crossed at Mukden in the summer of 1929, I was met at the railway station by a delegation of his former Japanese and Chinese students, who proudly informed me they had a surprise for me at the hotel, where I found Professor Wilson waiting. Although he could not stay the march of time in years, he remained young in thought and action. Every year of the summer sessions at Ann Arbor and Montreal he personally drove his automobile both ways to the meetings, accompanied by Mrs. Wilson. He took pleasure in entertaining his friends at dinner in a variety of interesting places. During the summer, when not otherwise occupied, he lived the life of a country squire at his summer home in Vermont, around which he gradually acquired more land and built homes for his children and grandchildren. It was the happy place of his honeymoon which he later purchased and, with his wife, developed into a haven of family gathering, rest and recreation.

The world in which George Grafton Wilson moved is better off because he was a part of it. His reputation for sincerity of purpose, calm judgment, fidelity to duty, abilities *par excellence*, and, above all, his fatherly sympathy, will live in the hearts and minds of thousands of young men and women whom he started and guided on their careers. His loss is felt in more circles of associations and friendships than most men have been vouchsafed to form, and he retained them throughout a lifetime slightly less than a decade short of a century.

GEORGE A. FINCH
Editor-in-Chief

BELLUM JUSTUM AND BELLUM LEGALE

In 1914 and long before the right of every sovereign state to go to war was recognized by the practice of states and by the overwhelming majority of writers, war, the "*ultima ratio regum*," served in the primitive international community a double purpose: a method of self-help to enforce a right, in the absence of international courts with compulsory jurisdiction, and a method of self-help to change the law, analogous to internal revolution, in the absence of an organ of international legislation in the true sense of this term.

In this century the old *bellum justum* doctrine, which played so great a rôle in the literature from the times of St. Augustine to Vattel, was, first,

historically re-studied in great detail.¹ After the first World War, even attempts at the revival of this doctrine were made: it was asserted that this doctrine is a norm of positive international law, often coupled with the further assertion that recent developments in international organization constitute a return to this doctrine. These assertions, however, are not tenable in law, but are only political ideologies or the consequence of a theoretically incorrect analysis.

While Catholic international lawyers, such as Mausbach and Cathrein, retained the traditional concept of *bellum justum*, the revival was inspired by very different motives in other writers. Louis Le Fur,² an adherent of Catholic natural law, used the doctrine as a political instrument to prove the Treaty of Versailles to be a *justa pax* in the beginning struggle over the revision of this treaty. Leo Strisower³ could in his book state with the utmost sincerity that he was not inspired by political motives. His approach was wholly ethical, a consequence of his basic philosophical conviction that law is a part of ethics. But exactly for this reason his argumentation is moral rather than legal. Hans Kelsen, the bitter antagonist of natural law, became the principal champion of the doctrine of *bellum justum*, which he felt compelled to defend for wholly logical reasons: If war cannot be interpreted either as a delict or as a sanction against a delict, then it is no longer possible to consider international law as law at all. But in his most recent treatment⁴ he does not decide whether this doctrine is a norm of positive international law, and states forcefully the grave objections against the workability of this doctrine.

That this doctrine was not positive law in 1914 and long before, seems settled;⁵ even in earlier times it was hardly ever a norm of positive interna-

¹ See, apart from monographs on St. Augustine, St. Thomas, Victoria, Suárez, Gentili, Grotius and others, the following works: A. Vanderpol, *Le droit de la guerre juste d'après les théologiens et les canonistes du Moyen-Âge* (1911); *idem*, *La doctrine scholastique du droit de la guerre* (1919); G. Salvioi, *Il concetto della guerra giusta negli scrittori anteriori a Grotius* (1915); P. Yves de la Brière, "Les droits de la juste victoire selon la tradition des théologiens catholiques," *Revue Générale de Droit International Public*, Vol. XXXII (1925); *idem*, "Les étapes de la tradition théologique concernant le droit de la guerre juste," *ibid.*, 1937, pp. 129 ff.; *idem*, *Le droit de juste guerre* (Paris, 1938); V. Beaufort, *La guerre comme instrument de secours ou de punition* (The Hague, 1933); Regout, *La doctrine de la guerre juste de St. Augustin à nos jours d'après les théologiens et canonistes catholiques* (1935); Kipp, *Moderne Probleme des Kriegsrechts in der Spätscholastik* (1935); J. von Elbe, "The Evolution of the Concept of Just War in International Law," this JOURNAL, Vol. 33 (1939), pp. 665-688.

² "Guerre juste et juste paix," *Revue Générale de Droit International Public*, Vol. XXVI (1919), pp. 9-75, 268-309, 349-405.

³ *Der Krieg und die Völkerrechtsordnung* (Vienna, 1919).

⁴ H. Kelsen, *General Theory of Law and State* (1945), pp. 331-338. He is followed by P. Guggenheim, *Lehrbuch des Völkerrechts*, Vol. I, pp. 590-593.

⁵ Naturally, an ethical and political critique of a concrete war has always existed; the ethical critique of the positive law, whether municipal or international, is socially indispensable. For, as the Romans said, *Non omne quod licet, honestum*.

tional law.⁶ It is of Catholic origin, anchored in natural law, a theological, not a legal concept. That is proved by its content as well as by its historical origin. The early Church under the pagan Roman Empire took a strictly pacifist attitude, an attitude preserved even today by some Protestant sects. It was the anti-state attitude of the early Christians which led to their persecution. The Romans of the Empire had long ceased to believe in Roman mythology; many foreign cults were not only tolerated in imperial Rome, but some of them were extremely fashionable among the "élite." The Romans further failed entirely to understand the transcendental importance and future of Christianity; for them the Christians were no more than an insignificant Jewish sect. The persecutions were not directed against a religion, but against what would be called today a "subversive movement."

But when, with Constantine, Christianity became the official religion of the *orbis terrarum*, when Christian persecutions were followed by those of the pagans, the Church had naturally to revise its attitude toward the Empire. In this connection the purely theological problem arose: How can a Catholic participate in a war, without committing a sin? It was a theological, not a legal problem. To this theological problem St. Augustine gave the answer: He can do so, provided the war is just. Transforming the formal criterion of the ancient Roman *jus fetiale* into the substantive criterion of objective, intrinsic justice of the cause of war, he created this doctrine, which was later elaborated by other theologians, consolidated by St. Thomas of Aquinas, Victoria, Suarez and others, and secularized, divorced from its Catholic soil, by Gentili, Grotius and their successors.

In its purity the doctrine is wholly an ethical one. There must be an objectively just cause of war, waged by the authority of the prince, and he must be inspired by the "*recta intentio*." Even the prince who has a just cause of war, can make an unjust war, if he acts from wrong motives, such as territorial aggrandizement or elimination of the enemy as a competitor in the future. And, if all these are fulfilled, the war can still cease to be just, if the prince imposes an "*injusta pax*." Thus Victoria lays down that the victor in a just war can impose upon the vanquished only conditions proportionate to the wrong committed, must always act with moderation and Christian modesty, and never has the right to ruin the vanquished enemy as a nation.

Just war is, therefore, a reaction against a wrong,⁷ a procedure either in tort (restitution, reparations, guarantees) or in criminal law (punishment, sanctions).⁸

⁶ See also A. Nussbaum, "Just War—a Legal Concept?" Michigan Law Review, Vol. 42 (1943-44), pp. 453-479.

⁷ Thus Victoria: "*Unica est et sola causa justa inferendi bellum injuria accepta*"; Grotius: "*Causa justī belli suscipiendi nulla alia esse potest nisi injuria*."

⁸ Thus, e.g., Cayetano: "*Habens justum bellum gerit personam judicis criminaliter procedentis*."

The *bellum justum* doctrine presupposes, therefore, the continuance of war and distinguishes between objectively just and unjust wars. If all the conditions of a just war are fulfilled, just war can be either a war of self-defense against the "*injustus aggressor*" or a war of execution to enforce one's right. In both cases it makes no difference whether the just war is, from a military point of view, waged defensively or offensively, nor is the factor who resorts to war first, decisive.

This doctrine in its purity, even if it might have been or were a norm of positive international law, would be practically valueless because of the grave objections against its workability. This very circumstance forced later writers to develop the doctrine in such a way as to deform it.

1. There are no objective criteria between "just" and "unjust" wars. If the just war is one of self-defense, it is just, if directed against a present or imminent unjust attack. When is an attack in a concrete case unjust? Gentili went so far as to call just wars even preventive wars, wars "which anticipate dangers, not premeditated, but probable or possible." In a war of execution to enforce a right, the right and its violation need definition.

2. Who is to decide in an objective way, which belligerent has a just cause and who is the "*injustus aggressor*"? This decision must be left to each state itself, a consequence which, as Verdross states, deforms the *bellum justum* doctrine. Hence, even the classic doctrine distinguished between "absolute" and "relative,"⁹ between "objective" and "subjective" justice. Therefore, war can be subjectively just on both sides, Gentili's "*bellum justum ex utraque parte*"; the same is proclaimed by Guggenheim today. Hence, practically every war is just, a doctrine identical with the traditional freedom of a state to resort to war. Sociological jurists therefore go so far as to see in this doctrine, which "invites subjectivism and abuse by State practice," nothing but a "degeneration into a mere ideology of power politics."¹⁰

Many other problems arise:¹¹ What of a belligerent who joins a war only in the last moment to participate in the advantages of victory? Or who changes sides during the course of the same war? Or who, with regard to partial wars constituting the same world war, has a just cause in one partial war, but is an "*injustus aggressor*" in others? The two world wars have given examples for all these hypotheses.

3. There is, further, the gravest objection that war is not an adequate means of enforcing the law: the "*injustus aggressor*" may be the victor. That is why Cayetano advises the prince not to go to war, even if he has a

⁹ One belligerent can have a just cause, whereas the other has a "still more just" cause.

¹⁰ Thus G. Schwarzenberger, "*Jus Pacis ac Belli*," this JOURNAL, Vol. 37 (1943), pp. 460-477, at p. 465.

¹¹ See Antonio Truyol y Serra, "*Crímenes de guerra y derecho natural*," *Revista Española de Derecho Internacional*, Vol. I, No. 1 (1948), pp. 45-73.

just cause, if he has not also the moral certainty of victory. Suárez' probabilism asks, at least, for the probability of victory. These statements show the radical deficiency, the "tragic confession of the negligible practical range of the classic *bellum justum* doctrine."¹²

Recent developments through the League of Nations, Kellogg Pact and United Nations, here mentioned as representative of the newer trend, do not constitute a return to the classic *bellum justum* doctrine.¹³

First, it must be emphasized that these treaties, as well as writers such as Strisower and Kelsen, are in a fundamental point different from the classic doctrine. They understand by the term "wrong" exclusively a violation of *positive* international law, whereas the classic doctrine means by "wrong" a violation both of positive and of *natural* law.¹⁴ A just war can be waged to enforce not only a positive, but also a *natural* right, e.g., the natural right of commerce. It is exactly by the enforcement of this *natural* right that Victoria ultimately justifies the conquest of America. Thus just war is given a *double* function: enforcement of *law* and enforcement of *justice*; law and justice need not be identical.

The League of Nations Covenant did not abolish war, but discriminated between different wars. The basis of distinction was *not*, as in the classic doctrine, between just and unjust wars, but between legal and illegal wars. The concept of *bellum legale* replaced the concept of *bellum justum*. The illegality of resort to war was not a function of the intrinsic injustice of the cause of war, but of the breach of a formal, procedural requirement. Hence, a legal war could have been waged even between Members of the League by a state which had no just cause of war, whereas a state which fully had a just cause of war could have been guilty of resorting to an illegal war. This is a very different thing from the *bellum justum* doctrine. The military "*action commune*" under Article XVI was a sanction in a truly legal sense, not against the "*injustus aggressor*" but against an *illegal* belligerent who had "resorted to war in disregard of his covenants under Articles XII, XIII or XV."

The Kellogg Pact, if taken at its surface value, could not constitute a return to the classic doctrine, as it did not distinguish between wars, but renounced war completely as an instrument of national policy. But the admitted legality of self-defense and the delegation to each state of the right to be the only judge to determine whether the conditions of self-defense exist, make this Pact practically only a restatement of general international law.

¹² *Ibid.*, at p. 60.

¹³ See Verdross, *op. cit.*; Alf Ross, *Constitution of the United Nations* (New York, 1950), pp. 140-141; W. Schätzel, "*Friede und Gerechtigkeit*," *Die Friedenswarte*, Vol. 50, No. 2 (1950), pp. 97-107.

¹⁴ This essential distinction is pointed out in Josef L. Kunz, *Kriegsrecht und Neutralitätsrecht* (Vienna, 1935), p. 2, note 3, and in A. Verdross, *Völkerrecht* (Vienna, 1950), p. 339.

Compared with the classic doctrine, war is also renounced as a war of execution to enforce a right.

Experience had shown that the Covenant and the Kellogg Pact, because of the aura of uncertainty hovering around the legal concept of "war," made it possible to wage "wars in disguise." Hence, the United Nations Charter, in making great progress from the point of view of legal technique, replaced the concept of "war" by that of the "threat or use of force." The Charter, therefore, distinguishes between legal and illegal use of force; the distinction is again based on the legality, not on the intrinsic justice of the cause. Use of force is, generally speaking, forbidden; but under Article 51 force can legally be used against an "armed attack," "until the Security Council has taken the necessary measures." If the Security Council is paralyzed by the veto, we are back to general international law. On the other hand, the military measures which can be decided by the Security Council are, contrary to Article XVI of the Covenant, not necessarily sanctions in a juridical sense.¹⁵

Furthermore, these new developments have hardly been able to avoid the grave objections which have been stated above against the *bellum justum* doctrine.¹⁶

Roscoe Pound has stated that a primitive and weak law wants, first of all, to establish peace, *i.e.*, absence of violence, and to guarantee the *status quo*. It puts peace above justice, whereas the intrinsic justice of the cause was the heart of the classic doctrine. This emphasis on security, more than justice, can be seen in recent developments. The Kellogg Pact renounces war, the Charter forbids the use of force—except in self-defense—without giving the states as a substitute the compulsory peaceful settlement of international conflicts, without guaranteeing the enforcement of their rights, without creating a workable procedure of peaceful change, without a guarantee that United Nations force will be brought to bear not only against an illegal aggressor, but also against a state which, without using force, does not fulfill an international obligation, without guarantee that, if such force is exercised by the United Nations, its use will be reasonably assured of success.

Two world wars and the fear of more catastrophic wars have made the avoidance of war more important than the achievement of justice. The first aim in the preamble of the United Nations Charter is "to save succeeding generations from the scourge of war." The first purpose in Article 1 is not to achieve and maintain justice, but to "maintain international peace and security." Again, we are faced with the antinomy between the two juridical values of security and justice. Security is the lower, but

¹⁵ H. Kelsen, *The Law of the United Nations* (London, 1950), pp. 732-739; Alf Ross, *op. cit.*, p. 141.

¹⁶ See Robert W. Tucker, "The Interpretation of War," *The International Law Quarterly* (London), Vol. 4, No. 1 (1951), pp. 11-38.

most basic value. "*La sécurité d'abord*," as the French thesis ran after the first World War; only then the intrinsic settlement of conflicts; here lies the difference between Chapters VI and VII of the Charter, between, within the Pan American orbit, the Rio Treaty and the Pact of Bogotá. First to establish security is the philosophy of recent developments, in the conviction that security is the indispensable pre-condition of later achieving justice. This philosophy may be wholly justified, but it is not the philosophy underlying the *bellum justum* doctrine.

JOSEF L. KUNZ

THE HUMAN RIGHTS COMMISSION AT THE CROSSROADS

The Commission on Human Rights is engaged in a valiant struggle to carry forward the banner raised in the Universal Declaration of Human Rights.¹ The "common standard of achievement" proclaimed in that Declaration was to be advanced, according to its terms, by teaching and education and by progressive measures, national and international, to secure the universal and effective recognition and observance of basic rights and freedoms. In attempting to obtain acceptance at this time of a universal covenant for national guarantees of basic civil and political rights, the Commission appears to us to have reached and passed a crossroads at which it should have stopped, looked and listened. It should now, in our opinion, return to the crossroads and consult anew the compass of human experience.

It was inevitable that the proposal of a covenant limited to civil and political rights would meet opposition from those who, on motives good, bad or mixed, demand equal guarantees for social, cultural and economic rights. It was inevitable that questions of great difficulty would arise with respect to the enforcement of national guarantees of even a limited group of basic rights in the constituent states of federal unions. The long discussions by which the proposed Covenant has been brought to the present stage may possibly be regarded as a part of the processes of teaching and education envisaged in the Universal Declaration. The Covenant itself, even if it is accepted in some form, cannot be regarded as a progressive measure to secure observance of human rights and freedoms.

The compass of human experience, which the Commission should consult in charting a new course, points to the methods which another international body has followed with success, over a period of thirty years, with respect to a significant part of the problem of human rights. The International Labor Organization, now one of the specialized agencies of the United Nations, was established in 1919 for the purpose of improving the conditions of labor throughout the world. It has pursued that purpose constantly by drafting and procuring the adoption of conventions and recommendations on one small subject after another, by recording the actual performance of

¹ See Supplement to this JOURNAL, Vol. 43 (1949), p. 127.

states with respect to the subjects dealt with, by providing remedies for non-observance of obligations assumed by states, and by acting as a stimulant to better performance by all. The scope of the ninety-eight conventions and eighty-seven recommendations which have been adopted by the General Conference of the ILO may be inferred from its recognition, in 1944, of "the solemn obligation" of the Organization "to further among the nations of the world programs which will achieve:

- (a) full employment and the raising of standards of living;
- (b) the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being;
- (c) the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labor, including migration for employment and settlement;
- (d) policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection;
- (e) the effective recognition of the right of collective bargaining, the co-operation of management and labor in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures;
- (f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;
- (g) adequate protection for the life and health of workers in all occupations;
- (h) provision for child welfare and maternity protection;
- (i) the provision of adequate nutrition, housing and facilities for recreation and culture;
- (j) the assurance of equality of educational and vocational opportunity.

Under the Constitution of the ILO, the recommendations of the General Conference are communicated to all members with a view to their being given effect by national legislation or otherwise. Members are bound, after bringing each recommendation to the attention of the competent authorities, to report, at appropriate intervals:

the position of the law and practice in their country in regard to the matters dealt with in the recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them.

The conventions adopted by the General Conference are referred by each member of the Organization to the competent authorities in its country

with a view to ratification, except as provided with respect to conventions which the national government in a federal state "regards as appropriate under its constitutional system, in whole or in part, for action by the constituent states, provinces, or cantons rather than for federal action." The Constitution of the Organization originally provided that "in the case of a federal State, the power of which to enter into conventions on labor matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only." This provision was amended in 1946. The duty of our Federal Government, for example, with respect to ILO conventions which it regards as wholly or partly within the sphere of action of our States, is now:

- (a) to make effective arrangements for reference of the conventions to the appropriate Federal or State authorities for the enactment of legislation or other action;
- (b) to arrange for periodical consultations between the Federal and State authorities with a view to promoting co-ordinated action to give effect to the conventions;
- (c) to inform the International Labor Office (the Secretariat of the Organization) of the measures taken to bring the conventions before the appropriate Federal or State authorities and of the action taken by those authorities; and
- (d) to report to the International Labor Office, at appropriate intervals, the position of the law and practice of our country as a whole and of the States in regard to the conventions, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the conventions by legislation, administrative action, collective agreement or otherwise.

It is important to note that the Constitution of the International Labor Organization contains no guarantee of human rights and freedoms. The members of the Organization joined in a declaration in 1944 that "labor is not a commodity"; that "freedom of expression and of association are essential to sustained progress"; that "poverty anywhere constitutes a danger to prosperity everywhere"; that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity"; and that "the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy." They have not, however, gone so far as to transpose to the key of international commitment the guarantees of the conditions of labor which many of them have embodied in their national constitutions.

It is of equal importance to observe that the members of the International Labor Organization are not bound by the Constitution of that body to accept the conventions adopted at meetings of the General Conference. Those con-

ventions are adopted by a majority of two-thirds of the votes cast by the delegates present. They are not signed on behalf of the governments represented. It is, of course, expected that a government will obtain the ratification of conventions for which its representatives have voted in the General Conference. The only obligation of a government which does not obtain the ratification of any convention is, however, to report to the International Labor Office at appropriate intervals:

the position of its law and practice in regard to the matters dealt with in the convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such convention.

Two further provisions of the ILO Constitution that should be noted relate to annual reports and the procedure for handling complaints. Each member of the Organization is bound to make an annual report to the International Labor Office on the measures taken by it to give effect to conventions to which it is a party. The Governing Body of the Organization is authorized to receive complaints from associations of employers or of workers that any member of the Organization has failed to secure in any respect the effective observance within its jurisdiction of any convention to which it is a party. Complaints are referred to Commissions of Enquiry and may be submitted for final decision to the International Court of Justice.

The federal state provisions of the ILO Constitution are of special importance in the consideration of practical measures for carrying forward the standard raised in the Universal Declaration of Human Rights. They are of special importance for two reasons: First, the highest level of actual observance of human rights and the most earnest desire to improve the condition of mankind throughout the world are found in some of the federal states, such as the United States and Canada, in which serious practical difficulties in the effectuation of national guarantees arise from the constitutional and traditional division of powers between federal and state or provincial authorities. Secondly, the federal state provisions of the ILO Constitution are the obvious source of the federal state article which has been suggested by our Government, with the support of a number of other governments, for inclusion in the proposed Covenant on Human Rights. This article, in the latest available draft, reads as follows:

In the case of a federal State, the following provisions shall apply:

(a) With respect to any articles of this Covenant which are determined in accordance with the constitutional processes of that State to be appropriate in whole or in part for federal action, the obligations of the federal government shall to this extent be the same as those of parties which are not Federal States;

(b) With respect to articles which are determined in accordance with the constitutional processes of that State to be appropriate in whole or in part for action by the constituent states, provinces or cantons, the federal government shall bring such articles, with favorable recommendation, to the notice of the appropriate authorities of the states, provinces or cantons at the earliest possible moment.

This article is, in our opinion, wholly unsuitable for inclusion in an instrument by which our Federal Government would commit our whole nation to guarantees of specified rights to all individuals within our territory. It should be obvious that every international obligation assumed by our Federal Government through a valid exercise of the treaty power is binding upon our State authorities as well as upon our Federal authorities. We have to choose between giving national guarantees and not giving them. If we give them, we must be prepared to stand behind them all the way, obtaining the co-operation of the State Governments to the fullest possible extent, but realizing that, if that co-operation is withheld, we have still another choice to make: We must take direct Federal action to effectuate the guarantees or we must accept the international consequences of our failure to do so.

The road to be taken by the Commission on Human Rights is plain. It is, essentially, the way of the ILO. The problem of the present and of the long future, in promoting the observance of fundamental rights and freedoms, is to obtain agreement and common action on small, practical measures in the direction indicated by the Universal Declaration. This is no time for paper guarantees in broad and general terms. A Commission on Human Rights duly reoriented could appreciably shorten the time the world has to wait for the assurance of a good life to "all the men in all the lands."

EDGAR TURLINGTON

THE NEED FOR A RETURN TO INTERNATIONAL LAW

It would be relatively easy today to compose a devastating comment upon international law as an instrument for the promotion of international peace and justice. It would be assumed, of course, in the terms of the basic statement of principles of the American Society of International Law, that the maintenance of international relations on the basis of law and justice constituted the highest objective in this sphere. But it would be relatively easy to demonstrate that international law, as such, had proven a very weak instrument for this purpose. This problem has again become of some interest, not to say actually acute, as a result of the continued difficulties of the United Nations International Law Commission and opinions recently expressed in that connection.¹

¹ See the Report of the Commission to the Fifth General Assembly, General Assembly, 5th Sess., Official Records, Supp. No. 12 (U.N. Doc. A/1316); this JOURNAL, Supp., Vol. 44 (1950), p. 105.

Thus international law, in one form or another, has existed and been recognized for some six thousand years. Yet the tone or tenor or moral quality and practical value of international relations have only improved to a limited degree in that rather considerable space of time. As late as 1914 international law had little or nothing to say concerning peace or justice in international affairs. Indeed a strenuous effort was made even at that time to avoid any identification of international law with either the cause of peace or the ideas of justice. The "realistic" outlook of the late seventeenth, eighteenth, and early nineteenth centuries was still in full vogue.

It was not surprising, therefore, that numerous friends of peace and justice rather deliberately abandoned international law for the movement toward international co-operation and eventually international organization (or organized international co-operation). It is not surprising that such persons felt little interest in, or enthusiasm for, international law. It has been slightly startling but not entirely incomprehensible to observe the almost complete lack of interest in international law displayed by many peace workers.

In the meantime, important developments were taking place looking in the direction of greater contributions by international law to international peace and progress. In particular an extensive expansion of conventional international law or international legislation designed to promote international understanding and co-operation had been instigated, had been practiced, and had had a beneficent effect (certain special cases excepted). In this process, however, the older common international law came in for little attention, little employment, and few results.

A somewhat similar situation has existed in the national sphere. The common law had dealt with individual rights and obligations and to some extent with the procedure for their effectuation, but not to any great extent with the problem of community peace and order except in a very indirect manner. As a result, those persons who have been primarily concerned with improving the existing state of affairs on this score—securing greater justice among men, reducing the provocation to violence, in short developing a better ordered society—have turned to the science and art of government, constitutional law, statutory legislation, and so on. They have had to meet the skepticism of the devotees of the common law and their contention that the distilled wisdom of experience must be more valuable than improvised reform. This in spite of the fact that the distilled wisdom of the ages had not contributed overwhelmingly to the improvement of community order and progress.

As in so many situations of this type, the answer or solution seems to lie clearly in a combination of the two or more competing elements, and neither in an elimination of one entirely nor in a meaningless compromise between them. On the one hand, the shortcomings of traditional inter-

national law as an instrument for securing peace and justice to the nations and the peoples of the world must be freely and frankly recognized and not glossed over or denied out of loyalty to an ancient institution. Then efforts can be put forward to correct the defects, so obvious on the record, by filling in gaps, correcting bad law, by codification, and so on. In the second place, the development of international legislation must go on and be improved in terms of its procedure and its administration, although this gets over to something outside the field of strict law. Finally, something can possibly be done to bridge the gap between these two aspects of international law and bring to an end what at various times—again as in national law—has amounted to a veritable feud.

On the other hand, strenuous efforts should be made to correct what is rapidly becoming a state of some confusion and almost irresponsibility in the field of international legislation and organization, not to mention international co-operation. It is one thing to try to amplify, enrich, and extend the fabric of international relations, juridical as well as practical; it is another to disregard fundamental juridical principles and indeed to pretend or, worse, to believe or feel, that there is no need for clarity, precision, and stability in the definition of international relations. International law may be old-fashioned, but it at least made a sincere effort to achieve a genuine degree of order in the international community. At one time there were compelling reasons for turning from the traditional international law to something more creative, more constructive, and indeed more imaginative. Today there is need for a good healthy reaction in the direction of international law.

How such a development may be brought about is another matter. More conservative types of international lawyers may well be invited to display a more sympathetic attitude toward the newer phases of international relations, and something of the sort is already observable. Indeed today the major difficulty seems to lie on the other side, namely, in persuading the devotees of international co-operation and progress to take any interest in orthodox international law and order. The inevitable result is to be observed in the by no means universal, but all too widespread, disregard for the more formal canons of international relations. Contemporary international relations cannot, it is quite true, be conducted satisfactorily within the limits of the rules of the sixteenth, or even the eighteenth, century. It is also true that contemporary international relations cannot be conducted entirely by improvisation and haphazard adjustment. Finally, the mere multiplication of machinery and international institutions may complicate rather than simplify, confuse rather than effectuate, international co-operation. Waiving all questions of motive, on one side or the other, the time seems ripe for a renewed attempt to magnify the rôle of law in international affairs.

PITMAN B. POTTER

ASSERTED JURISDICTION OF THE ITALIAN COURT OF CASSATION OVER THE
COURT OF APPEAL OF THE FREE TERRITORY OF TRIESTE

To an international lawyer examining the reports of the Italian Supreme Court of Cassation it must be with some surprise that he comes upon a case holding that that court has jurisdiction of appeals from the Court of Appeal of Trieste—notwithstanding that Italian sovereignty over Trieste terminated upon the coming into force of the Treaty of Peace;¹ that pursuant to that Treaty the Free Territory of Trieste continues for the time being to be administered by the Allied military commanders; and that the Allied Military Government has forbidden appeal from any court within to any court without the occupied territory. This note will examine that holding.

Article 21 of the Treaty provides that "There is hereby constituted the Free Territory of Trieste," and continues:

2. Italian sovereignty over the area constituting the Free Territory of Trieste, as above defined, shall be terminated upon the coming into force of the present Treaty.

The Treaty came into force on September 15, 1947.

Annex VI of the Treaty sets out the "Permanent Statute of the Free Territory of Trieste," and Annex VII establishes a "Provisional Régime" pending the coming into force of the Permanent Statute. A governor was to be appointed by the Security Council after consultation with the Governments of Yugoslavia and Italy. Annex VII provides:

Article 1. . . . Pending assumption of office by the Governor, the Free Territory shall continue to be administered by the Allied military commands within their respective zones.

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Article 10. Existing laws and regulations shall remain valid unless and until revoked or suspended by the Governor. . . .

As is well known, a Governor has never been appointed, and accordingly the Territory remains under military administration—a British-U. S. Zone that includes the City of Trieste, and a larger but less populous Yugoslav Zone. (On March 20, 1948, the Governments of the United States, the United Kingdom, and France issued a statement recommending that the Free Territory be restored to Italian sovereignty—having regard to the fact that "agreement on the selection of a governor is impossible" and that there was "abundant evidence" to show that the portion of the Territory occupied by Yugoslav forces had been "virtually incorporated into Yugoslavia."²)

¹ Dept. of State, *Treaties and Other International Acts Series*, No. 1648; this *JOURNAL*, Supp., Vol. 42 (1948), p. 47.

² Dept. of State Bulletin, Vol. XVIII, No. 456 (March 28, 1948), p. 425.

The system of Allied Military Government, of which the AMG of Trieste is the vestige, came into operation on Italian soil with the attack on Sicily, July 10, 1943. It was unrolled on the mainland as the 15th Army Group fought its way up the peninsula. On September 3, 1943, the military armistice was signed,³ and on November 10, 1943, the Allied Control Commission for Italy was established.⁴ As rapidly as the Italian Government was prepared to accept responsibility (delay was on the Italian, not the Allied side), and as the progress of the armies permitted, rear areas were handed over to be administered by the Italian Government. But along the cutting edge of the Allied advance it was of course necessary to maintain the Allied Military Government.

On June 12, 1945, the Supreme Commander's Proclamation No. 1⁵ was posted in Venezia Giulia, the region on the extreme northeast of Italy. (The German forces in Italy had surrendered during the days preceding the High Command's surrender at Berlin on May 8.) Proclamation No. 1 declared that

the laws of the territory, in effect on the 8th September, 1943, will remain in force and effect except insofar as it may be necessary for me, in the discharge of my duties as Supreme Allied Commander and as Military Governor, to change or supersede them by proclamation or other order by me or under my direction.

By General Orders No. 6⁶ of July 12, 1945, the Senior Civil Affairs Officer directed that the civil courts constituted under the laws in effect on September 8, 1943, resume their duties, pronouncing judgment in accordance with the formula "in the name of the law":

There shall be no appeal from the decision of any Court functioning in the Occupied Territory to any Court of whatsoever competence outside the Occupied Territory.

It was the practice of the AMG, in aid of the policy of restoring regions as rapidly as practicable to Italian administration, to adopt and make mandatory in AMG territory the current decrees of the Italian Government.⁷ But so long as AMG bore direct responsibility for a region, it was sound principle to require that no appeal be taken from the local courts to any court outside the occupied territory. There were special reasons why this was important in the case of Venezia Giulia, where both Italian and Yugoslav interests were involved.

On June 9, 1945, at Belgrade, the Yugoslav Minister of Foreign Affairs and the United States and British Ambassadors agreed upon a line (the

³ Treaties and Other International Acts Series, No. 1604.

⁴ Dept. of State Publication 2669 (European Series 17), p. 76.

⁵ Allied Military Government Gazette, Venezia Giulia, No. 1, p. 3.

⁶ *Ibid.*, p. 32.

⁷ Review of Allied Military Government and of the Allied Control Commission in Italy, Allied Commission APO 394 (1945), p. 45.

"Morgan line") that would separate the zone of the U.S.-British forces from that of the Yugoslavs.⁸ Thereupon the Yugoslav Army fell back, after having occupied the city of Trieste for some forty days. It was agreed that these arrangements were not to prejudice or affect the ultimate disposal of Venezia Giulia.

The British-U. S. forces and the Yugoslav forces were separated by the same line when on September 15, 1947, the Treaty of Peace went into effect, with its provision that the military administrations should be continued in the respective zones of the Free Territory.

By Proclamation No. 1⁹ of September 15, 1947, Major General Airey, the Commander of British-U. S. Forces, made provision for the continuance of military government:

1. Pending the assumption of office by the duly appointed Governor of the Free Territory of Trieste, all powers of Government and administration in that Zone of the Free Territory in which British and United States Forces are stationed, as well as jurisdiction over its inhabitants, shall continue to be vested in me in my capacity as Commander of the said British and United States Forces.

2. All existing laws, decrees and orders in force in the British-United States Zone on the date of this Proclamation shall remain in force and effect except as abolished or modified by Proclamation number two which is promulgated herewith, and except as I may, from time to time, change or supersede them. . . .

This left in effect G.O. No. 6 of July 12, 1945, forbidding appeals to any court outside the occupied territory.

General Airey's Report No. 1, covering the period from September 15 to December 31, 1947, explained the policy of the "caretaker administration."¹⁰ It "would naturally be bound to adhere to the democratic principles [and] to respect the basic freedoms and the fundamental human rights" embodied in the United Nations Charter. A main consideration was "to avoid creating any precedent which would limit or hamper the future action of the Governor." Existing legislation would be interfered with only "if such a course is essential for the well being of the Zone or for the maintenance of public and military security." Successive reports, after the appointment of a governor had come to naught and after the Three Powers had made their declaration of March 20, 1948, urged that the problem of Trieste "can only be solved satisfactorily and justly by the return, as soon as possible, of the Free Territory to Italy. . . ."¹¹

In the meantime the Allied Military Government has had to carry on

⁸ Dept. of State Publication 2562 (Executive Agreement Series 501).

⁹ Allied Military Government Official Gazette, British-United States Zone, Free Territory of Trieste, Vol. I, No. 1, p. 1.

¹⁰ Report of the Administration of the British-United States Zone of the Free Territory of Trieste, Report No. 1, p. 7.

¹¹ Report No. 9, Oct. 1 to Dec. 31, 1949, p. 8. So too Report No. 10, 1950, p. 7.

under difficult conditions.¹² Economic prospects are discouraging for an area wrenched from its natural context. The Territory has drawn support from the Marshall Plan, and has been admitted as a participating country in the Organization for European Economic Co-operation. Local government has been modeled on the pattern existing in Italy. Political parties have come into being, and communal elections have been held. The system of courts is similar to that prevailing in Italy; most of the judges are career members of the Italian judiciary, obtained on the request of the AMG from the Italian Government. The Italian legislation, including the civil and penal codes, is the basic law of the Zone. But the AMG has promulgated many orders amending or rescinding the Italian legislation in existence on September 15, 1947.¹³ It has promulgated many orders reproducing current Italian legislation. It has promulgated orders having no counterpart in Italy. Some orders follow Italian legislation in part.

It is not surprising that cases arose involving questions of the jurisdiction of the Supreme Court of Cassation to hear appeals from decisions made at various times by the Court of Appeal at Trieste. In *Soc. An. Zanini v. Busato*,¹⁴ decided September 20, 1948, it was held that appeal in cassation lay from a judgment of the Court of Appeal when the cause had arisen in a tribunal which "*è ed è sempre stato sotto la incondizionata ed assoluta sovranità dello Stato Italiano.*" In such a situation it would be "*inopportunamente ed inefficacemente*" that the validity of G.O. No. 6 would be drawn into discussion.

Analysis discloses two possible bars to the jurisdiction of the Court of Cassation. One is the effect of the termination of Italian sovereignty over the place where the Court of Appeal sat—a termination that became effective after the Court of Appeal acted and before the appeal was heard in the highest court. The cause of action arose and suit had been brought in territory always Italian. Principle would accord jurisdiction to the Court of Cassation. It would perform its normal function with respect to litigation that had at all times been wholly Italian. Suppose (which God forbid) that the States composing our First Judicial Circuit, except Rhode Island, were separated from the United States: surely as to litigation arising in the United States District Court for Rhode Island, and decided prior to the cession by the Court of Appeals sitting in Boston, the subsequent cession would not cut off the appellate jurisdiction of the Supreme Court. The matter would remain within the reach of the Federal judicial power.

Now consider a second possible bar to the jurisdiction of the Italian Court of Cassation: the effect of the order of the occupying Power that

¹² Discussed in General Airey's reports, and summarized in Trieste Handbook 1950, issued by the Information and Public Relations Division of the AMG.

¹³ Published in the Official Gazette, *supra*, note 9.

¹⁴ Cass. Civ. I. 20.9.48, n. 1623. *Giurisprudenza Completa della Corte Suprema di Cassazione*, 1948, 3° Quad., p. 1197, No. 2324; and 1949, 1° Quad., p. 236, No. 42.

appeal should not be taken from a court within to a court without the occupied territory. For what reason would the Allied Military Government have made such an order? First, no doubt, to enforce the proposition that "all powers of government and administration" are, for the time being, exercised by the occupying Power. While yielding ready assent to the obligation to respect existing local law, it would not brook resort to the appellate courts of the country whose territory it was occupying *in invitum*. But this objection, it may be said, would not operate where the litigation had to do with a matter arising outside of the occupied zone. There is a second reason, however, why the occupying Power might properly object: It owes no duty to the government whose territory it is for the moment occupying to facilitate the operations of that government by permitting the use of courts sitting in the occupied zone. The Allied Forces were, however, following very benevolent policies toward the Italian Government and it may be—this is a question of fact on which the writer is uninformed—that the AMG acquiesced in the Court of Appeal at Trieste hearing cases arising outside the occupied territory. In that event there would be no reason of principle why the Italian Court of Cassation should refrain from entertaining such an appeal in third instance.

Two other appeals from the Court of Appeal of Trieste—*Pellegrini v. Travani*,¹⁵ decided October 11, 1948, and *Ferro v. Mazzola*,¹⁶ decided August 20, 1949—appear to have been entertained on the same basis. The reports are not specific as to dates of trial in first instance and of appeal, or as to the actual situation with respect to the military occupation.

Panagos v. Drossopulo,¹⁷ decided on November 15, 1948, was an appeal from a judgment entered during the war by the Court of Appeal of Rhodes. By Article 14 of the Treaty of Peace, "Italy hereby cedes to Greece in full sovereignty the Dodecanese Islands . . .," including Rhodes. The Court of Cassation was very clear that the appeal must be dismissed. By the fact of cession, every legal relation between the Italian state and the cause came to an end. It concluded:

E l'insuperabile impossibilità d'esercizio della funzione giurisdizionale dell'autorità giudiziaria italiana su quel rapporto priva anche questa Suprema Corte di poterla su di esso esercitare quale organo del potere statuale de cui è investita.

This is a hard-headed view of hard facts.

With this background¹⁸ we come to the cases on which this note would

¹⁵ Cass. civ. I, 11.10.48, n. 1725, *ibid.*, 1948, 3° Quad., p. 741, No. 1774.

¹⁶ Cass. civ. I, 20.8.49, n. 2366, *ibid.*, 1949, 2° Quad., p. 783, No. 1916.

¹⁷ Cass. civ. Sez. Un., 15.11.48, n. 1823, *ibid.*, 1948, 3° Quad., p. 684, No. 1660.

¹⁸ As bearing upon the psychological situation, reference should be made to the address of Professor Ermanno Cammarata, Rector of the University of Trieste, at the opening of the academic year on Dec. 4, 1949, published in the *Giornale del Lunedì* of Dec. 5. It argued that the words "Italian sovereignty . . . shall be terminated upon the

focus—appeals from Trieste entertained by the Court of Cassation and decided respectively on September 26, 1950, and March 15, 1951. In the former case, *Ferronato v. Brocchi*,¹⁹ the Trieste court's judgment had been rendered on January 15, 1945, at a time, that is, prior to the occupation of Venezia Giulia by the Allied Forces. In the latter, *C.E.A.T. v. Società Hungaria*,²⁰ the Trieste court's judgment was of March 29, 1950, subsequent to the entry into force of the Treaty by which Italian sovereignty over the area was terminated. In each case the Court of Cassation sustained jurisdiction to enter a judgment operative in a place (1) no longer under Italian sovereignty, a place (2) which, pursuant to the Treaty, was being administered by the Allied Military Government whose order forbade resort to any court outside the occupied territory. There were thus two distinct bars to the exercise of jurisdiction.

In the Ferronato case the court said of its clear-cut judgment dismissing the appeal from Rhodes that more careful study led to a different conclusion. The right to appeal was born at the time of the judgment sought to be reviewed; what mattered was the *nationality of the judgment*, not the factual situation that had come into being after its rendition. The cause pertained to the Italian juridical system; hence it belonged to the court at the apex of that system to pass final judgment.

The court then turned to the question whether its jurisdiction was controlled by proclamations issued first by the German authority and then by the Allied Forces prohibiting appeal in cassation from the court at Trieste. On this point the Court referred to Article 43 of the Hague Regulations Respecting the Laws and Customs of War on Land: the occupying forces shall respect, unless absolutely prevented, the laws in force in the country. On the basis of this provision, said the court, it had already denied relevancy for the Italian juridical system of such proclamations of the German Military Government; for the same reasons it now adopted that solution as to analogous proclamations of the Allied Military Government.

The opinion of March 15, 1951, took off from the ground thus assumed: it was the nationality of the decision, whether it belongs or does not belong to the juridical system of which the appellate judge is a part, that determines appellate jurisdiction. Assuming "for simplicity of demonstration" that, by Article 21, Italian sovereignty over Trieste had really been terminated, still the Provisional Régime was a transitory stage from one system (the Italian) to another (that of the FTT) during which the pre-existing

coming into force of the present Treaty" really did not mean "shall be *extinguished*"; that the extinction of sovereignty was conditioned on the actual setting up of the anticipated government of the Free Territory, and that Trieste was still subject to Italian sovereignty.

The Court of Cassation, in the decisions here discussed, does not found its reasoning on the "Cammarata thesis."

¹⁹ Cass. civ. Sez. Un., 26.9.50, n. 2552. *Foro Italiano*, 1950, I, p. 1129.

²⁰ Cass. civ. Sez. Un., 15.3.51, n. 658, *ibid.*, 1951, I, 282.

system was to continue. (Article 10 of Annex VII provides: "Existing laws and regulations shall remain valid unless and until revoked or suspended by the Governor. . . .") So the courts at Trieste remained organs of the Italian state. As to the Allied Military Government, it now derived its powers, not from conquest, but from the Treaty; it remained limited, however, by Article 43 of the Hague Regulations, whereby military occupation does not destroy or suppress the juridical system of the occupied state or have any effect upon the state and its governmental organs which continue to exercise their authority in its name. The Military Government must abide by the laws of the occupied state: G.O. No. 6 was in conflict with that obligation and would not be recognized by the Court of Cassation.

Now this reasoning is plainly wrong, a compounding of errors. Take first the matter of the effect of a termination of sovereignty. (Exclude for the moment the matter of the powers of a military occupant, which is quite separable.) Territory Z is lost to State A, A's sovereignty over Z is "terminated." The instrument may provide that existing laws shall remain in effect until amended or repealed. A mere stipulation that the property and acquired rights of the inhabitants shall be respected necessarily requires observance of the law on which such property and rights were based, namely, the law of A. The judges of the acquiring state, or of the separate Territory of Z, will resort if need be to authoritative materials to learn what that law provides for cases arising before them. It may be strange and, in one sense, foreign law to them, in that they are applying law derived from the foreign sovereign A. To the judges in State A, the basic law of the Territory of Z is familiar, being in a sense their own national law; yet inasmuch as A's sovereignty over Z is terminated, Z and its law have become foreign to the judges of A. The principle is obvious, though one may perform a sleight of hand with the words. There was "French law" in Louisiana after the Louisiana Purchase, "Mexican law" in Texas and California, and for that matter "English law" in the original States after 1776: but it is American courts that have applied it whether familiar or strange. The Italian Court was acting on the right principle in the earlier case when it held that the moment Rhodes was lost to Italy the power of the Italian court over an appeal from Rhodes was lost.

Italian sovereignty over Trieste was "terminated"—came to an end—on a certain day. The treaty provision is really unequivocal. The United States and British Governments, and that of France as well, have gone on record as favoring retrocession. The actual Administration at Trieste urges that solution, and in the meantime follows Italian legislation as closely as practicable. But for the present Trieste remains foreign to Italy, and the "trustee administration"—no matter for the moment that it happens to be a military administration—is following a plain duty in insisting that the governmental organs of Trieste are not organs of the Italian state and that the Italian state, whether by its legislature or its

executive government or by the voice of its judiciary, does not command in the Free Territory.

Turn now to Article 43 of the Hague Regulations. The Italian court purports to be giving a general construction to the article: its holding was not addressed to the peculiar situation of the Allied Military Government of Venezia Giulia or of the Free Territory of Trieste. The text reads:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

What is involved in "respecting the laws?" The preparatory materials at the Hague Conferences record no discussion of the specific point involved in the court's holding. But the situation envisaged is one wherein the military forces of one government (or of Allied Governments) have excluded another government from a portion of its territory; the two parties are at war with one another; normal friendly intercourse is suspended; considerations of comity have no place; even private communication between the two zones will have been forbidden. And yet "the laws in force" includes the legislation on appellate jurisdiction, which the occupying Power must "respect" by permitting appeals from the local courts to be carried to the higher courts of the enemy country! A moment's reflection will suffice to reject this far-fetched contention. Reference to discussions of Article 43 in the books, with their observations on actual practice, will show that no such obligation is recognized. The excellent discussion of "Occupation of Enemy Territory" in the British *Manual of Military Law*, and the more concise but no less accurate summary in the American *Rules of Land Warfare*, make clear that those governments recognize no such rule as the Italian court sought to derive from Article 43.

The free governments that are today concerting measures for combined defense have a common interest in supporting sound doctrine in the law of military government and civil affairs. The work of reconstruction in liberated and occupied countries which followed progress of the Allied Forces in the Mediterranean, European, and Pacific Theaters during the late war was an important and a perplexing aspect of Allied operations. Principles of the law of occupation had to be applied in the context of a combined resistance to the totalitarian powers of the Axis—with due respect for "the laws in force," but with a sturdy determination, too, to substitute liberal for Fascist principles in law and administration. The experience thus developed is an important asset today. In making a bad precedent to meet the special situation in Trieste the Italian court has created confusion where it is to the common interest to maintain firm principle.

CHARLES FAIRMAN

CURRENT NOTES

IN MEMORIAM: GEORGE GRAFTON WILSON

George Grafton Wilson, Nestor of the American Society of International Law, died at Cambridge, Massachusetts, on April 30, 1951. A teacher all his life, he exemplified to students for 60 years Aristotle's characterization of the teacher as one of the "golden men." No one in the last half-century has guided as many persons into the ways of international law, or had as continuous an influence upon its content. He had entered his 89th year, having been born at Plainfield, Connecticut, March 29, 1863.

Wilson was the last survivor of the group that originated the American Society of International Law at the Lake Mohonk Conference on International Arbitration. On June 2, 1905, on a proposal by George W. Kirchwey, a group of 21 adopted a report to establish the American Society of International Law and to issue a journal as its organ.¹ Oscar S. Straus was named Chairman and James Brown Scott Secretary. The other signers were David J. Brewer, George Gray, John W. Foster, Andrew D. White, Jacob M. Dickinson, James B. Angell, W. W. Morrow, John W. Griggs, John Bassett Moore, Theodore S. Woolsey, Leo S. Rowe, Everett P. Wheeler, Robert Lansing, Chandler P. Anderson, Charles Henry Butler, Joseph H. Beale and Charles N. Gregory. The next year the Society was under way and at its first annual meeting April 19-20, 1907, there were over 400 members. The JOURNAL began publication in 1907, with Wilson as one of its editors. He succeeded Scott as Editor-in-Chief in 1924 and for 19 years guided the JOURNAL until in 1943 he resigned to become Honorary Editor-in-Chief.

As a college teacher Wilson's career extended from 1891 to 1943, over a half a century. He received an A.B. degree at Brown University in 1886, was school principal at Groton, Connecticut, in 1887, took the Brown A.B. in 1888, was principal of the Rutland, Vermont, high school in 1889-90, studied at Heidelberg, Berlin, Paris and Oxford in 1890-91 and was awarded his Ph.D. at Brown in 1891. He joined the Brown faculty as associate professor of social and political sciences that year and became professor in 1894. In 1908 he began giving courses in international law at Harvard College, where he became professor of international law in 1910 and emeritus in 1936. He was professor of international law at the Fletcher School of Law and Diplomacy from 1933 to 1937 and a special lecturer until 1943.

It was Wilson who gave form and substance to the training of naval officers in international law at the Naval War College at Newport. Freeman Snow of the Harvard faculty started a series of lectures there in 1894 and

¹ See Proceedings of the Society, 1907, p. 23.

died before the course was finished. His manuscript and notes were put into a book by Charles H. Stockton, then a commander, and a second edition of this *International Law; a Manual based upon Lectures delivered at the Naval War College* was issued in 1898, immediately after the Spanish-American War. The sporadic lectures at the Naval War College were taken over by Wilson from John Bassett Moore in 1900, and for nearly four decades, until 1937, Wilson's annual volumes of *International Law Topics* or *Situations* bore the imprint of the Naval War College. The 7,000 pages of the Naval War College brochures constitute Professor Wilson's major contribution to international law. Occasionally these were documentary compilations, but every volume was intended to provide the naval officer, at home and alone in foreign ports, with precise answers to problems he might face. A typical volume ran to 200 pages and posed six to eight questions. The precedents, regulations and instructions were applied to the hypothetical facts and their solution recorded. The result was a series of monographs superior in form and definiteness.

The topics were not academic. I remember dropping into Wilson's office when he was reading in *Foreign Relations, 1905*, the Japanese ordinance on "defense sea areas." We discussed the ordinance to the offhand conclusion that a navy at war had about the same right to proclaim a strategic area on the high seas as municipal authorities might to close a street temporarily with signs of "men working." In *International Law Situations, 1912* "Strategic Areas on High Seas" concludes that the commander of a United States cruiser should decline to escort a merchant vessel through a high-sea area proclaimed by a belligerent and should advise its master to keep clear of the area as warned by a cruiser of the belligerent. During the war of 1914-18 such areas were set up and in 1939 the "Neutrality Act" identified "combat areas," while now the Inter-American Treaty of Reciprocal Assistance reverses the device and proclaims a hemispheric area to be defended.

Wilson was an educator in the natural sense of the word—he drew out his students with the deft wisdom of a quiet umpire. Few who were exposed to his classroom technique failed to think, and many formed there habits of active cogitation and cognition that lasted a lifetime. For many years three hours a week in the first course were divided as two lectures and one hour's discussion of a problem applying the principles divulged in the lectures. Current events were frequent subjects taken up in the classroom, sometimes involving the solution of a problem in the news, sometimes an analysis of positions taken in current diplomacy. Another feature of his teaching was a "clipping thesis," requiring close following of the news to see to what extent the rules under study related to the run of events.

The method was semi-Socratic, with all hands participating and the professor quizzically watching an argument that fell short of debate. Usually the class arrived at their own conclusion, but if Mr. Wilson had occasion to

rule, the pronouncement was clear and impeccably sound. He thought much, weighed facts carefully, and matured conclusions conscientiously. He would have been better, but not more favorably, known had he jumped into, and vocalized promiscuously during, the crusades that littered the decades of his activity, as some of his contemporaries did. His judicious mind avoided controversy, and his conclusions were implicit with wisdom and a high sense of balance.

His writing was better than it looked, uncluttered by philosophical complications and simply expressed. Almost any paragraph could be blown up into a monograph. I did 80,000 words on the violation of treaties thirty-five years ago and at the end found that I had only supported 300 words of his with analysis and incidents. It was from Wilson that came the concept of a scholarly paragraph being of so fine a texture that it could be expanded into an article or monograph without more distortion than a film frame receives in projection on the screen. The cogency of his writing was probably affected by the precision of his work at the Naval War College, but it was also due to diligence. For two score years you could find Wilson in his office any time from 9 a.m. till 10 p.m., though his iterated complaint was that "they build the nights so close to the mornings these days." At any moment he was available for advice or consultation.

The teacher in Wilson lay behind two volumes. In 1901 with George Fox Tucker he did the textbook, *International Law*, which went into a 10th edition thirty-six years later. In 1910 he published the Hornbook Series volume, *Handbook of International Law*, which saw a third edition in 1939. Though unpretentious, these works were the basis of his teaching, supplemented by a reserved list of other writers, and literally hundreds of teachers throughout the world owed and still owe their training to Wilson's application of those texts. His contributions to "Cyc," restating international law in terms of judicial decisions, put his subject-matter in the idiom of the municipal lawyer. Three of his early books were pioneering efforts, *Insurgency* (1900), *Submarine Telegraph Cables in their International Relations* (1901), and *L'Insurrection* (1902). He edited the centenary edition of Wheaton's *International Law*, published in the Classics Series in 1936. Another edited volume was *The Hague Arbitration Cases* (1915).

In addition to service at the Naval War College, Wilson's official work included that of plenipotentiary delegate to the London Naval Conference, where he and Louis Renault had great influence on the Declaration of London of 1909, and service as adviser to the American Delegation to the Washington Conference on Limitation of Armament, 1921-22. He settled with The Netherlands the account of the ships taken over by angary in 1917-18 at about a fourth of the cost per ton of the arbitral award in a like case. The instances for thirty-five years in which his advice or ruling kept naval feet out of sloppy seas are innumerable and unrecorded.

He was a member of the *Institut de Droit International* and long a di-

rector of the *Revue de Droit International*. He was breveted with the LL.D. in 1911 by Brown University and the University of Vermont and in 1937 by the University of Hawaii. The main dormitory and commons of the Fletcher School of Law and Diplomacy is Wilson House, and to the school he gave his large library on international law in 1946.

DENYS P. MYERS

FORTY-FIFTH ANNUAL MEETING OF THE SOCIETY

The Forty-Fifth Annual Meeting of The American Society of International Law took place at the Hotel Washington in Washington, D. C., from April 26 to April 28 last. The general theme of the meeting was the position of the United States in world affairs, with special reference to international conventions. The meeting opened on Thursday afternoon, April 26, under the chairmanship of Dr. Charles G. Fenwick of the Pan American Union, with a discussion of United States constitutional issues raised by the American position in international affairs. The Honorable Adrian S. Fisher, Legal Adviser of the Department of State, delivered an address on "Executive Powers in Foreign Relations," with particular reference to the President's powers as Commander-in-Chief of the armed forces. Professor Charles E. Martin of the University of Washington discussed "Presidential Discretion in World Affairs through Executive Agreements," pointing out the distinctions between treaties and executive agreements and the presidential powers in relation thereto. Mr. Francis O. Wilcox, Chief of Staff of the Senate Committee on Foreign Relations, spoke on "The President's Authority to Send Armed Forces Abroad," particularly in connection with the obligations assumed by the United States under the North Atlantic Treaty.

President Manley O. Hudson formally opened the meeting on Thursday evening with an address on "The Common Interpretation of the Mandates of International Law," in which he reviewed the progress of the past half-century in developing international organs for the interpretation and application of principles of international law, and emphasized the achievements of the World Court first established in 1920 and continued under the United Nations Charter of 1945. Following the Presidential address the Honorable Christian A. Herter, Member of Congress, delivered an address on "The Relation of the House of Representatives to the Making and Implementation of Treaties."

The session on Friday morning, April 27, was devoted to a discussion of "The Legal Effect of Treaties in Municipal Law," Professor Edwin D. Dickinson of the University of Pennsylvania Law School presiding. Professor Alona E. Evans of Wellesley College read a paper on "Some Aspects of the Problem of Self-Executing Treaties." She was followed by Mr. Edgar Turlington of the District of Columbia Bar, who discussed "The

Special Position of Federal States" in relation to treaties. Professor Lawrence Preuss of the University of Michigan spoke on the "Execution of Treaty Obligations through Internal Law," comparing the United States system with those of some other countries.

On Friday afternoon the subject of the meeting was "Particular Problems concerning Incorporation of Treaty Provisions." Dr. Pitman B. Potter of American University presided. Dr. Josef L. Kunz of the University of Toledo discussed "Present-day Efforts at International Protection of Human Rights," giving a critical analysis of the Convention for the Prevention and Punishment of the Crime of Genocide. Dr. Alwyn V. Freeman, former member of the Inter-American Juridical Committee, spoke on "The Rights of Aliens and Human Rights." The final paper on the Friday afternoon program was a report of the Society's Committee to Study Legal Problems of the United Nations, presented by the Chairman of the Committee, Professor Clyde Eagleton of New York University. The report dealt with the handling of treaties by the Secretariat of the United Nations.

"Sanctions under the United Nations Charter" was the subject of the session on Friday evening, presided over by President Hudson. Mr. Benjamin V. Cohen, Alternate U. S. Representative to the United Nations, discussed "Principles Governing the Imposition of Sanctions under the Charter." Mr. Harding F. Bancroft, Deputy U. S. Representative on the United Nations Collective Measures Committee, spoke on "The United Nations as a Collective Security Organization," and Professor Quincy Wright of the University of Chicago, presented a paper on "Collective Security in the Light of the Korean Experience."

The meeting concluded on Saturday evening, April 28, with the annual banquet presided over by Judge Hudson and attended by members of the diplomatic corps in Washington, government officials and other members of the Society. H. E. Dr. Hildebrando Accioly, Chairman of the Council of the Organization of American States, spoke briefly on the problem of sanctions under the inter-American system, with reference to the Treaty of Reciprocal Assistance signed at Rio de Janeiro in 1947. Dr. Alberto Lleras, Secretary General of the Organization of American States, spoke on the subject of the inter-American regional security system. Brief remarks were also made by Dr. Ivan Kerno, Assistant Secretary General in Charge of Legal Affairs of the United Nations, and by the Honorable Everett W. Mattoon, Assistant Attorney General of the State of California.

At the business meeting of the Society on Saturday morning, April 28, the final steps were taken for the incorporation of the Society as provided in the Act of Congress approved on September 20, 1950, and in the resolutions of the Executive Council of November 11, 1950.¹ The following resolution was adopted:

¹ See this JOURNAL, Vol. 45, No. 1 (January, 1951), pp. 155-162.

RESOLVED, That:

(a) The corporation accepts incorporation provided for in the Act of Congress approved September 20, 1950 (Pub. Law 794, 81st Congress, Chap. 958, 2d Session, 64 Stat. 869).

(b) The corporation adopts as its constitution, by-laws and regulations the constitution, by-laws and regulations of the American Society of International Law, an unincorporated association.

(c) The persons now serving as President, Honorary President, Vice Presidents, Honorary Vice Presidents, Secretary, Treasurer, Assistant Treasurer, Executive Secretary, and members of the Executive Council of the said unincorporated association shall serve in the same capacities on behalf of the corporation from the date of the said meeting until the expiration of the periods for which they were chosen by the said unincorporated association.

(d) The committees and employees of the unincorporated association shall become committees and employees of the corporation on the date of the transfer of the property and business of the association to the corporation.

(e) The corporation adopts as its seal the seal of the unincorporated association, with appropriate modifications.

(f) the corporation designates as its agent in the District of Columbia, to accept service of process for the corporation, William S. Culbertson, a member of the corporation residing at 2101 Connecticut Avenue, N. W.

(g) The corporation authorizes Lester H. Woolsey and Charles G. Fenwick to accept for the corporation the property and business of the unincorporated association, subject to all liabilities and obligations of the association, and to execute and deliver any and all instruments which may be necessary or desirable in connection with the acceptance of the said property and business.

As has been the custom of the Society, the business session began with the reading of the list of members who had died during the past year. Among these were Dr. Dionisio Anzilotti, former Judge of the Permanent Court of International Justice and honorary member of the Society, the Honorable Henry L. Stimson, an honorary Vice President of the Society, and Mr. Frank E. Hinckley, one of the original members. Appropriate minutes regarding these members were presented and placed in the records of the meeting.

The Society also adopted the two following resolutions of interest to its members:

RESOLUTION ON STATE DEPARTMENT PUBLICATIONS

RESOLVED, That the Society notes with satisfaction the authorization by the Act of September 23, 1950 (64 Stat. 979) of the inauguration of an annual compilation entitled "United States Treaties and Other International Agreements" to begin as of January 1, 1950 and to be published by the Secretary of State separately from Statutes at Large;

That, in addition to the publication in separate bindings of the treaties proclaimed in 1948 and 1949 as a part of Statutes at Large, a compilation of the treaties and other international agreements brought into force subsequently to the issuance of Senate Document 134, 75th Congress, 3d session, "Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1923-1937, Vol. IV," should be published to the end that all treaties and agreements to which the United States is or has been a party may be available in a series of volumes;

That the Society urges that steps be taken to accelerate the preparation of *United States Treaty Developments*, which should be published in print, not by the offset process;

That the Society expresses its great concern over the imbalance of appropriations for the Publications of the Department of State which has arisen because of the large editions of materials for adult education programs and which should not be allowed to restrict the established program of issuing such essential documentation as *Foreign Relations of the United States*;

That the Society expresses its satisfaction at the project to reprint such volumes of Hackworth's *Digest of International Law* as are out of print, and calls the attention of the Department of State to the need for a supplement to this publication, with a digest of important legal decisions, issued annually if possible;

That the Society urges the use of the *Department of State Bulletin* for the publication of as much current documentation as may be practical, bearing in mind the requirement that the *Bulletin* include all current decisions on policy as released.

RESOLUTION ON TREATIES OF JUDICIAL ASSISTANCE

WHEREAS, Members of the American Society of International Law, engaged in the practice of law, have encountered serious difficulties in obtaining evidence and the testimony of witnesses abroad for use in legal proceedings within the United States; now, therefore, be it

RESOLVED, That the American Society of International Law favors the negotiation of treaties and agreements of judicial assistance and urges the Department of State to enter upon the negotiation of such treaties and agreements at the earliest opportunity.

Sir Cecil J. B. Hurst, former Judge of the Permanent Court of International Justice, and a member of the Society since 1907, was elected an honorary member of the Society.

Judge Manley O. Hudson was re-elected President of the Society for the ensuing year. The following were also re-elected for the coming year: Honorary President, The Honorable Dean G. Acheson; Vice Presidents, George A. Finch, Edwin D. Dickinson, Philip C. Jessup; Honorary Vice Presidents, Philip Marshall Brown, Frederic R. Coudert, William C. Dennis, Charles G. Fenwick, Cordell Hull, Charles Cheney Hyde, Justice Robert H.

Jackson, Arthur K. Kuhn, Honorable George C. Marshall, Honorable Elbert D. Thomas, Charles Warren, George Grafton Wilson,² Lester H. Woolsey. The Honorable John Foster Dulles was elected an Honorary Vice President.

The following were elected members of the Executive Council to serve until 1954: W. J. Bivens, Michael Francis Doyle, John N. Hazard, Lucy Somerville Howorth, John E. Lawson, Herbert S. Little, Dean Rusk, Richard Young. Miss Ruth E. Bacon, of the Department of State, was elected to fill a vacancy in the Executive Council, to serve until 1952.

The Nominating Committee for the coming year was elected as follows: Stanley K. Hornbeck, Chairman; Edward W. Allen, Willard B. Cowles, P. J. Kooiman, Brunson MacChesney.

Immediately following the adjournment of the business meeting of the Society, the Executive Council met at noon Saturday, April 28. It re-elected Mr. Edward Dumbauld, Secretary of the Society, and Mr. Edgar Turlington, Treasurer, for the coming year. It also reappointed Miss Eleanor H. Finch, Executive Secretary, and Mr. Denys P. Myers, Assistant Treasurer. The Council noted with regret the resignation of Professor Malbone W. Graham and re-elected the other members of the Board of Editors of the JOURNAL, Judge Hudson being made an honorary editor as of May 9, 1951. The following new members were elected to the Board: Professor Charles Fairman, Stanford University; Professor Hans Kelsen, University of California; and Mr. Richard Young, Harvard University. The Council also adopted regulations governing the activities of the Society, such regulations consisting of a revised compilation of directions and authorizations previously adopted by the Council from time to time in the form of resolutions. The regulations as adopted on April 28 will appear in the *Proceedings* of the Society for 1951.

ELEANOR H. FINCH
Executive Secretary

SOVIET COMMENTS ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

The feeling of self-righteousness, so typical of the Soviet régime, is expressed in the editorial articles of the December, 1950, and January and February, 1951, issues of the *Sovetskoe Gosudarstvo i Pravo*. The February, 1951, issue (No. 2, 1951) carries an article entitled "Aggression and Intervention in the Far East in the Light of International Law," by Professors V. N. Durdenevskii and A. M. Ladyzhenskii. The two authors accuse the United States of a long record of intervention:

After the First World War the U. S. imperialists began a very big game in the Far East, having proclaimed in the Washington Treaty of 1922 the principle of the "open door" and having used their economic power

² Deceased April 30, 1951. See above, pp. 526, 549.

in forcing that door and in eliminating their competitors. The two most important rivals—Japan and England—were successfully pushed out by the Americans who profited to a large degree from the events of the Chinese Civil War and the Second World War.” (p. 54.)

The purpose of the present American policy in the Far East is, according to the authors, to recover the positions lost after the defeat of the Kuomintang.

The article recalls older “black” marks on the American Far Eastern record:

Dulles,¹ the grandfather of the not unknown in our time warmonger John Dulles, was acting as an American adviser to Japan at the time of the conclusion of the peace with China in 1894 and strongly recommended to the Japanese the annexation of Formosa; the meaning of the “mediation” by Theodore Roosevelt is well known too, as he effectively helped the Japanese in their retaining at the end of the Russian-Japanese war the conquests in Manchuria, the Sakhalin and the Kurile Islands.” (Footnote at pages 53 and 54.)

Of course, American intervention in the Far East reached its peak with the Korean action. While at the time of the publication of that particular issue of the *Sovetskoe Gosudarstvo i Pravo* such problems as the bombing of Chinese bases in Manchuria and the blockade of the Chinese coast were only in the stage of public discussion in the U. S., the two authors accepted as facts “. . . many cases of bombing of Manchurian territory by the American armed forces, the blockade of the Chinese coasts by the U. S. Navy . . .” (p. 55.) This and the armed action in Korea, combined with the presence of the Seventh Fleet in the waters of Formosa, make up the Soviet picture of American intervention. The latter contains all the elements of an aggression, because (here the authors quote the text of a resolution adopted by the Soviet-sponsored Second Peace Congress which was held this year in Warsaw) “. . . an aggression is any illicit action on the part of a State which is the first to use its armed forces against another State, whatever might be the alleged pretext.” (p. 55.)

The authors state that aggression in the sense of international law may occur only in relations between states. The use of force by one section of the population against another may never be qualified as an aggression; this would be only a civil war. They quote abundantly international documents and doctrine to prove the validity of their distinction, which is objectively true: the course of Prof. Saldana at the Hague Academy of International Law in 1925, the Covenant of the League of Nations, the Harvard Draft Treaty of 1939 on the Rights and Duties of States in Case of Aggression, the United Nations Charter, the Rio de Janeiro Treaty of

¹ This is an erroneous reference to ex-Secretary of State John W. Foster, who actually participated in the Japanese-Chinese peace negotiations. He was at that time an adviser to the Emperor of China.

1947, and the discussions within the United Nations International Law Commission.

In contradistinction to those definitions [of aggression] the North Atlantic Pact of April 4th, 1949, understands by aggression "an armed attack" directed against one of the contracting powers, but one does not know from which quarter such an attack might come; thus it is admitted apparently that an aggressor might not be a State or, at least, not necessarily a State. This has been done without doubt deliberately, as the North Atlantic Pact has aggressive purposes, and its authors attached a great importance to blurring of the concept of aggression. (p. 56.)

Although the use of armed forces represents for the authors the main form of aggression, they consider such a definition as being too narrow, because there might be cases of indirect aggression. They refer to the two identical conventions for the definition of aggression concluded by the Soviet Union with her neighbors in London on July 3 and 4, 1933. They enumerate the contracting parties: the U.S.S.R., Turkey, Poland, Czechoslovakia, Iran, Yugoslavia, Afghanistan, Rumania and Finland. As the undersigned took an active part in the drafting of those conventions, it might not be out of place to remind the Soviet authors of the three omissions on their list of signatories—Lithuania, Latvia and Estonia, whose annexation seven years after the conclusion of the London conventions did not particularly enhance the value of Soviet international pledges. They might not like to be reminded of other facts: the invasion by Soviet armed forces on September 17, 1939, of Polish territory, the attack on Finland in the same year, and the ultimatum presented to Rumania in the following year. Yet those actions could hardly be reconciled with the London conventions, which stated in their Article 2:

. . . the aggressor in an international conflict . . . will be considered the state which will be the first to commit any of the following acts:

1. Declaration of war against another state;
2. Invasion by armed forces, even without a declaration of war, of the territory of another state;
3. An attack by armed land, naval or air forces, even without a declaration of war, upon the territory, naval vessels or aircraft of another state;
4. Naval blockade of the coasts or ports of another state;
5. Aid to armed bands formed on the territory of a state and invading the territory of another state . . .²

The action against Poland engaged at that time in repelling the Nazi invasion, as well as that against Finland, corresponded exactly to the provisions in Art. 2, pars. 2 and 3, of the London conventions, not to mention the Pacts of Non-Aggression which should have protected those two states

² This JOURNAL, Supp., Vol. 27 (1933), p. 193.

against a Soviet invasion. The ultimatum to Rumania was accompanied by threats to commit acts forbidden by the same conventions of 1933.

One could wonder what the Chinese action in Korea represents in the light of the London conventions. To this query the Soviet authors have a ready answer. They refer to the Vth and XIIIth Hague Conventions, under which a neutral state does not assume any responsibility for its nationals who may take part individually in hostilities carried on by one belligerent against another.³

The participation of foreign volunteers in civil wars may not be qualified as intervention. Once upon a time Polish volunteers took part in the struggle for the independence of the United States and later on fought in Garibaldi's formations for the unification of Italy; during the Cuban Civil War in 1897 quite a few Americans fought in the Army of Maceo; volunteers of 58 nations fought for the Republican Government in the Spanish Civil War of 1936-1939; however, nobody has qualified a state as an interventionist, because its nationals acted as volunteers. (p. 59.)

Messrs. Durdenevskii and Ladyzhenskii must have read *Alice in Wonderland*, if they compare the mass intervention of the regular Chinese armies in Korea with the individual acts of such persons as Kosciuszko or Pulaski. If they wanted to find a better analogy in the history of the War of Independence, they should have referred to General Rochambeau and his expeditionary corps and to Admiral de Grasse and his navy; but France did not deny at the time her responsibility for the action of her regular armed forces. Even if one would accept for the sake of the argument the contention that the Chinese soldiers fighting in Korea are volunteers, how can one reconcile the formation of their military units and their support on Chinese territory with Art. 2, par. 5, of the London conventions, which are treated by the two authors as though they were a part of general international law?

The Soviet authors condemn very severely any intervention, even such as would not involve an actual use of force:

The entry of the armed forces of the intervening State on the territory of another State is not the necessary requirement of an intervention. The latter may take various forms, if there are only the elements of a direct or indirect coercion, or, at least, of a threat of coercive measures. This is why the intervention may take the form of a direct armed action (entry of the land forces, naval bombardment or air bombing, artillery fire across the frontier, naval blockade) as well as those of terroristic

³ The Soviet authors had in mind Art. 6 of the Vth Hague Convention which states: "A neutral power does not incur responsibility from the fact that individuals cross its frontier singly in order to enlist in the service of the belligerents." They seem to have forgotten Art. 4 of the same Convention: "No body of soldiers shall be organized or enlistment bureaus opened in the territory of a neutral power for the benefit of the belligerents." (This JOURNAL, Supp., Vol. 2 (1908), pp. 119, 118.)

action through sending saboteurs and assassins, organization and support of armed revolts, diplomatic pressure combined with a menace of the rupture of diplomatic relations and the use of force, economic pressure in the guise of a boycott while maintaining economic relations with other States, or any other unilateral coercive action, a dictate. (p. 58.)

Bearing in mind this wide definition of an illegitimate intervention, one might be tempted to test it by applying it to the Soviet pressure exerted at the time of the formation of the people's republics in Eastern Europe or of the Communist *coup* in 1948 in Czechoslovakia. The fact of this pressure, made possible by the presence of the Soviet armies in Eastern Europe, is formally acknowledged in the Soviet publications. A colleague of the two authors, Mr. N. P. Farberov, states, for instance, in his book, *The Constitutional Law of the Countries of People's Democracy* (Moscow, 1949), that the people's régimes were established thanks only to "the rout of Fascism by the armed forces of the Soviet Socialist State and the presence of the Soviet Army which prevented the bourgeoisie from seizing power and helped the toilers to take government in their own hands." (p. 14.)

The two distinguished authors should perhaps devote a second thought to the two following sentences which they address only to the Western Powers because of the latter's attitude in the United Nations:

There is a saying that hypocrisy is a tribute paid by vice to virtue, and that hypocrisy is thus better than cynicism. But there might be such an hypocrisy which is not a tribute paid to virtue, but is a mockery of it; such hypocrisy is worse than cynicism. (p. 55.)

The December, 1950, issue (No. 12, 1950) of *Sovetskoe Gosudarstvo i Pravo* carries an editorial devoted to the United Nations. Its opening words are disarming by their self-confidence:

The whole world knows that the struggle for true international peace and a real international co-operation forms the unalterable foundation of the foreign policy of the Soviet Socialist State created by V. I. Lenin and J. V. Stalin. (p. 1.)

The title of the article provides an adequate answer to the question as to who is the villain of the international drama: "The American imperialists try to transform the U.N. into a simple annex of the U. S. Department of State." If international peace, originally founded upon the Potsdam Agreements and the United Nations Charter, is at present imperiled, the responsibility is that of the United States and her satellites, among whom figure the Western European Powers, the members of the British Commonwealth and the Latin American Republics. The article lists the following offenses against peace committed by the American *bloc* at the last General Assembly: (1) the revision of the United Nations resolution of

December 12, 1946, concerning the Franco régime in Spain; (2) the "illegal" interference in the domestic affairs of Bulgaria, Hungary and Rumania by raising the question of the execution of the provisions of the Peace Treaties relating to human rights; (3) the "illegal" prolongation of the mandate of the United Nations Secretary General by the General Assembly alone, without a previous recommendation of the Security Council; (4) the so-called Peace Resolution of November 3, 1950, which, according to the Soviet authors, illegally transferred the powers of the Security Council to the General Assembly, thus undermining the principle of the unanimity of the great Powers, which "is the fundamental principle of the U.N." Why was this Peace Resolution adopted? "The American imperialists hope to secure thus for themselves an even greater latitude for using the U.N. for aggressive purposes." (p. 3.)

The same December issue carries an article by Professor F. I. Kozhevnikov on "Engels' Appraisal of 19th-Century Russian Diplomacy." Engels considered Tsarist Russia as the main menace to European progress; probably for this reason he was inclined to exaggerate its successes, although the 19th century also witnessed many failures of Russian foreign policy. Although Engels highly praised only the professional skill of the Russian diplomats, while being extremely critical of their purposes, Professor Kozhevnikov takes a great pride even in this somewhat doubtful tribute paid to pre-revolutionary Russia. He notes carefully, with the naïve pleasure of reborn Russian nationalism, every nice word uttered by Engels in regard to the Russian nation. "Engels noticed frequently the astounding courage of the Russian soldiers." (p. 19.) "Marx and Engels had a high esteem for the Russian military commanders." (p. 19.) But "Engels overestimated grossly the rôle of foreigners in the Russian diplomacy." (p. 25.) According to contemporary Soviet writers the Tsarist conquests in the Caucasus and Central Asia were not acts of colonial imperialism, because they opened to the local backward nations access to a higher civilization and bestowed upon them the privilege of a common life with the Russian nation. (Of course, similar colonial expansions of other Powers continue to be denounced as capitalist imperialism.) "However, from the point of view of general history, Russia, despite all, played, according to Engels, a great progressive rôle in regard to the backward nations of Asia. . . . Engels in one of his letters addressed to Marx observed: . . . 'Russian dominion plays a civilizing rôle in the areas of the Black and the Caspian Seas and in Central Asia, in regard to the Bashkirs and the Tartars.' " (p. 31.) The author hastens to add: "The same applies to the nations of the Caucasus." (p. 31.) Engels sounds in this interpretation like a Russian Kipling. The annexations accomplished by the Tsars should not be condemned, because ". . . one must not identify Russia with Tsarism and autocracy. Russia is above all the great Russian people." (p. 32.) This virtuous nature of the

Russian pre-revolutionary conquests is now a familiar theme. M. D. Bagirov wrote in the *Bolshevik* (1950, No. 13, p. 35):

Regardless of the arbitrariness and cruelty of the Russian colonizers the annexation of the Caucasus by Russia played in regard to the Caucasian nations a positive and progressive rôle.

The *Sovetskoe Gosudarstvo i Pravo* follows the general Party line in devoting more and more space to the internal politics of the United States. For instance, the January issue (No. 1, 1951) contains two articles whose content is well summarized by the title of one of them: "The Fascistization [*Fashizatsiya*] of the U. S. A.," by B. A. Shabad (pp. 38-45). The other article, entitled "The offensive against the democratic forces of the American people," has for its author one of the editors of the journal, Professor A. N. Trainin, a member-correspondent of the USSR Academy of Sciences. Professor Trainin considers that the Internal Security Law of 1950, which is the object of his study, abolishes in fact the individual freedoms of American citizens.

Mr. Shabad lists several measures which, according to him, prove the rapid transformation of the United States into a Fascist state; of course, the trial of the Communist leaders is given its due prominence, but even American scholars are not forgotten:

Attempting to justify the necessity of the liquidation of the sovereignty of nations, the American "scholarly" lackeys of the capital are creating all sorts of "theories." Most of all, the representatives of American jurisprudence make great efforts in this respect. For all the superficial variety of those "theoretical" investigations by American lawyers (the "theory" of a "World Government," "individual as a subject of international law," "national sovereignty as a cause of wars," etc.), their objective remains always the same—to justify the expansionist policy of the American monopolies which aim at the establishment of an American World Empire. (p. 43.)

According to Professor Trainin, the Fascist trend in the United States is connected with the external aggressive policy:

There is a deep connection between the new statute and the whole foreign policy of the U.S.A. Politics are indivisible. The rulers of the U.S.A. undermine the foundations of international law within the U.N. and at the same time subvert the bases of their own national law. The aggression in Korea is accompanied by a ruthless attack against the rights of the American people. (p. 37.)

The Soviet authors do not care too much for actual facts. For instance, a book of civic education, widely circulating among the Soviet young people and destined for the use of the Communist Youth League clubs, provides very interesting material in this respect (*Besedy ob obshchestvennom i gosudarstvennom ustroystve S.S.S.R.*, Moscow, 1948): "In England there exists a parliament which enacts laws not only for England herself, but

also for all her colonies and Dominions." (p. 136.) "... from among 547 million inhabitants of the British Empire almost 500 million people do not participate in the elections of the English parliament." (p. 136.) This is quietly printed despite the Statute of Westminster of 1931 and the India, Burma and Ceylon Independence Acts of 1947.

The Soviet Government and the Party seem to attach a great importance to a proper training of lawyers. The Central Committee of the Party issued on October 5, 1946, instructions concerning the improvement of legal studies; this produced two results: the opening of several new schools of law and the improvement of studies. Two professors of the Moscow School of Law, the best in the country, M. V. Kozhevnikov and I. D. Martysevich, discuss the execution of the Party instructions by their own school in the article entitled "Some questions of university legal training" (*Sovetskoe Gosudarstvo i Pravo*, January, 1951, No. 1). The information they supply is very interesting, because it throws much light upon the organization of Soviet legal studies.

The curriculum includes the Latin language and Roman law (Those two courses are to be expected, because Soviet and modern Russian law in general owe, like any continental law, a great debt to the Roman conceptions), the economics and politics of foreign countries, history of international relations, public and private international law. The great attention paid to foreign and international law is due to the express recommendation contained in the above-mentioned resolution of the Central Committee. The whole period of legal studies lasts five years: beginning with the eighth semester, students must choose a special study group among the following five: the theory and history of the state and law, Soviet constitutional law, international law, criminal law, and civil law. An international lawyer could not complain that his field has been neglected. The international law students attend special courses and seminars relating to the laws of foreign countries, the diplomatic and consular laws, international public and private law. In spite of the extensive length of studies, the curriculum must be packed with many courses and seminars, as the authors complain: "The number of courses is very great, especially in some of the study groups . . . students are so overburdened with their class work that it is not always possible to set aside for them some days reserved for their own independent research." (p. 47.) Students are expected to take part in study clubs, each of them devoted to a particular field of law. In 1949-1950 there were 13 such clubs, each of them assisted by a professor. Each club had from 8 to 10 discussion meetings. Better students' dissertations and articles are printed in the university publications.

Candidates for instructorships are selected from among the best graduating students. Such candidates take an additional three years' graduate course. In the second year they assist professors in the seminars and in pre-grading term papers; in the third year they are expected to deliver

some class lectures and to review the diploma dissertations which must be presented by every student before graduation. After the completion of the three years of graduate studies the young instructor is assigned to a school of law. All this represents an earnest attempt to train better qualified lawyers, among others, in the field of international law.

W. W. KULSKI

EXTRATERRITORIALITY AND THE *WABASH* CASE*

The right of Americans resident, or even transient, in Chinese territory to be tried by American consular officers and under the laws of the United States was incorporated in the first treaty concluded between China and the United States in 1844.¹ Caleb Cushing, the American negotiator of this treaty, gave this special privilege enjoyed by American and other foreigners in China its first formal and legal expression in the Treaty of Wang-hsia.² Cushing also provided, in his report to the Secretary of State,³ the first elaborate history and rationalization of this legal fiction by which Americans in China were regarded as being outside of (*extra*) Chinese jurisdiction (*territory*). The principle thus established was operative in China for almost a hundred years⁴ and came to be known as "extraterritoriality," often shortened for convenience to "extrality."

The American treaty of 1844 became the type expression of extraterritoriality in China, and the American envoy, Caleb Cushing, is recognized as the author of the principle of extraterritoriality as an exception to the customary practice of international law among European and American states. Despite this identification of the United States with the principle of extraterritoriality in China, American contact with Chinese legal procedure, prior to 1844, was comparatively limited and by no means consistently unfavorable to the Chinese. The British or, more exactly, the English East

* The *Wabash* case was the first case in which official Chinese documents give mention to the United States. Relative to the matter of extrality in China, it is the first case now known which presented Chinese court efficiency in a favorable light. It has heretofore been unknown in available literature. The author translated the material himself from Manchu documents in Peking.

The significance of the *Wabash* case was to set a negative precedent against extrality for China. American commercial elements in China were consistently against extrality, but official quarters in China joined the pro-foreign elements in the adoption of extrality after the Terranova and the Sue Aman cases. In the deliberations, the *Wabash* case did not enter into the discussions.

¹ Treaty of Wang Hiya (Wang-hsia), U. S. Cong. 28:2, S. Doc. 58; also Hunter Miller, *Treaties and Other International Acts of the United States of America* (Washington, 1934), Vol. 4, pp. 559-662.

² Articles XXI and XXV.

³ U. S. Cong. 28:2, S. Doc. 58.

⁴ Germany and Austria lost their extraterritorial rights in China in 1919. The Soviet Union relinquished hers in 1922; Japan forswore extrality in Manchukuo in 1932 and in China proper in 1938; the United States and Great Britain gave up extrality in China in 1943.

India Company, had numerous encounters with the Chinese law between 1689 and 1838.⁵ The Americans, coming into the trade late and with fewer ships and men involved, were involved in only three serious cases between 1784 and the conclusion of the Treaty of Wang-hsia in 1844.

The case of the American seaman, Francis Terranova, charged with killing a Chinese boatwoman at Whampoa and strangled at the order of a Chinese court, October 28, 1821,⁶ is the one instance of an American being submitted to trial and punishment by a Chinese court and under Chinese law. The case received both English and American comment⁷ and is generally recognized as being the principal American (negative) precedent for extraterritoriality. The second case also involved a homicide charge against an American national. An unspecified American was charged with killing one Sue Aman outside the American factory at Canton incident to a demonstration against the supposed evil effects of a new weather vane erected by the American consul. This Sue Aman case occurred during Cushing's mission in China and was the immediate cause of his formulation of the principle of extraterritoriality and his drafting of the clauses in the Treaty of Wang-hsia.⁸

The third case in which Americans were involved is not a precedent for extraterritoriality because the Americans were the victims instead of the perpetrators of the homicide, and also because the case presented a favorable view of the fairness and efficiency of the Chinese courts. Chinese documents published by the Palace Museum in Peking⁹ give a fuller account of the case than the previously available English and American documents. Examination of these documents and a re-examination of the American and British versions provide some interesting evidence that Americans were content with Chinese jurisdiction and opposed to the principle of extraterritoriality. This "servile" American point of view is openly expressed in the trade journals of the period¹⁰ and was often con-

⁵ Morse cites sixteen cases in which foreigners were charged with killing Chinese and seven cases of Chinese assault against foreigners. Of these only one case, Terranova, is American. The *Wabash* case is not mentioned, and the Sue Aman case, which occurred in 1844, was, of course, beyond the terminal dates of his comment. *International Relations of the Chinese Empire* (London, 1910), Vol. I, pp. 100-109.

⁶ The basic U. S. documents on the Terranova case are found in U. S. Cong. 26:2, H. Ex. Doc. 71; the Chinese account of the case is found in a memorial of Juan Yuan, Nov. 8, 1821, in *Ch'ing-tai Wai-chiao Shih-liao* (Peking, 1932), *Tao-kuang* series, Ch. 1, pp. 7b-9b.

⁷ "Trade and Intercourse with China," *The Quarterly Review* (London), Vol. 42 (1830), pp. 165-167; E. Everett, "Execution of an Italian at Canton," *North American Review*, Vol. 40 (1835), pp. 58-68.

⁸ U. S. Cong. 28:2, S. Docs. 58 and 67.

⁹ *Ch'ing-tai Wai-chiao Shih-liao* (State Papers of the Manchu Dynasty), 10 *pen* (Peiping, 1932).

¹⁰ Cf. Tyler Dennett, *Americans in Eastern Asia* (New York, 1912), pp. 120-121; *Niles Weekly Register* (Dec. 20, 1817), Vol. 13, p. 266.

temptuously noted by British traders and officials both in London and Canton.

The *Wabash* case is one of "ladrone pirates" in which piracy was accompanied by murder. United States Consul Wilcocks reported that the American ship *Wabash*, of Baltimore, Captain C. L. Gantt, was lying in Macao Roads "with a quantity of opium and seven thousand dollars in specie on board." On the night of May 26, 1817, while Captain Gantt was at Canton ascertaining the state of the market, a native boat, manned by fifteen Chinese, came alongside the *Wabash*. The *ladrones* boarded the ship and attacked the crew, "murdered the chief mate and one seaman, whose bodies they threw into the sea; wounded the second mate and two seamen; drove four of the crew overboard—two of whom were drowned, two swam to shore; plundered the ship of all the specie, thirty-five cases of opium, and many articles of less value, and then left her. The second mate died on the 28th at the hospital at Macao; the two wounded seamen have since recovered."¹¹

Consul Wilcocks, through the Hong merchants, addressed a memorial to the Governor General at Canton demanding justice for the "outrage committed on a ship under the flag of the United States, while at anchor within the waters of this empire." In his report to the Secretary of State, the Consul added: "In enumerating the loss, I was careful not to mention the opium, as it was the prevailing opinion that the pirates had proceeded to a distant province, if not to Manila; in which case, very little hope was entertained of seizing them."¹²

Much to Consul Wilcocks' surprise and embarrassment, the Chinese authorities within a month captured the pirates and recovered "a considerable quantity of the opium." And, as the Consul noted, "The latter circumstance occasioned not a little disgust" on the part of the Governor General. Wilcocks took the position, however, that Captain Gantt had refused a pilot offered to bring him into the port, thus disproving any intention to bring in contraband goods. The Governor General accepted this explanation and on June 13 invited Consul Wilcocks, with several other Americans, to witness the execution of five of the principal pirates. The execution took place, but Consul Wilcocks "for reasons it is not necessary to state . . . refused, but prevailed on two American gentlemen to attend."¹³

The Governor General issued a proclamation on the case to Consul Wilcocks, via the Customs Superintendent (Hoppon) and the Hong merchants, in which he said:

Piratical banditti plundering a foreign ship and murdering the mercantile seamen is the highest possible degree of cruelty and wickedness.

¹¹ Wilcocks to Adams, Sept. 22, 1817, U. S. Cong. 26:2, H. Ex. Doc. 71, p. 7.

¹² *Ibid.*, loc. cit.

¹³ *Ibid.*, loc. cit.

The said foreign ships, having crossed the seas for commercial purposes to be murdered by pirates, is an extremely lamentable case.¹⁴

Later, the first official notice by China of American participation in the opium trade was made by the Governor General. He notified Consul Wilcocks that "foreign opium, the dirt used in smoking, has long been prohibited by an order received; it is not allowed to come to Canton," and requested the Consul "to write a letter immediately back to your country and tell these things to your honorable country's president."¹⁵ The notification was duly made and John Quincy Adams, as Secretary of State, informed Consul Wilcocks that the prohibition had been duly published in the United States.¹⁶

The Chinese documents on the *Wabash* add a good deal of illuminating detail as to the techniques of Chinese criminal procedure, the character of Chinese officials and of the criminals involved, and the opinion held by China of the United States. As the earliest Chinese official documents dealing with our country, these two memorials and one Imperial Edict of 1817, merit some attention by American historians.

The Chinese account of the pirating of the *Wabash* is found in a memorial from the Governor General of Liang-kuang, Chiang Yu-hsien, dated July 19, 1817.¹⁷ Chiang Yu-hsien (1766-1830) was a Chinese, native of Liao-tung, a peninsula on the southern coast of Manchuria, who had become a bannerman in the Manchu military organization. A degree man in the Chinese civil service examination system, he had received his *Chin-shih* (doctor's) degree in 1784 and served in various offices. In 1816, the year before the *Wabash* case, he had memorialized on the reception of the British mission headed by Lord Amherst.¹⁸ There is no other indication of interest in foreign affairs.

The memorial first makes clear that the piracy took place near the *hsien* (county) border, so the officials of two counties were involved, as well as the Prefect of Canton, in whose jurisdiction both the *hsien* lay. Upon being notified of the crime, the Governor General made all these officials, as well as the coastal garrisons and sea patrols, responsible for the capture of the pirates. Heavy rewards were offered for their capture. As a result of these vigorous steps, fourteen of the fifteen pirates were captured, and these are all listed by name. The corpses of two of the murdered Americans were recovered and identified, but the bodies of the three who were thrown overboard and drowned were not recovered. The five Americans are also

¹⁴ Translation by the Reverend Robert Morrison, *ibid.*, p. 9. The proclamation is dated June 6, 1817.

¹⁵ Cited by Dennett, *op. cit.*, p. 120.

¹⁶ National Register, 1818; Niles Weekly Register (Feb. 21, 1818), Vol. 13, p. 431; *ibid.* (Jan. 6, 1821), Vol. 19, p. 308.

¹⁷ *Ch'ing-tai Wai-chiao Shih-liao*, Chia-ch'ing series, Ch. 6, pp. 43a-45b.

¹⁸ *Ch'ing-shih Lieh-chuan*, Ch. 34, pp. 16b-25b; mentioned in Hummel, *Eminent Chinese of the Ch'ing Period*, Vol. 2, p. 716.

listed by name, but as the English accounts do not give their names, it is possible to reconstruct the English names from the Chinese only tentatively. Of the loot, a total of 838 dollars in treasure was recovered and sixteen cases of opium. This was taken to Canton, identified by Captain Gantt and the "treasure" returned to him.

Chiang Yu-hsien identifies the pirates as *Tanka* (*tan-chia* or *tan-min*) or "boat people." The *Tanka* were outcasts of Canton, and were forced to live in their boats, constituting one of the four minority groups¹⁹ barred from the official examinations and limited to certain menial occupations.²⁰ As the *Tanka* did not have "house numbers" and were not included in official registers, it was more difficult to apprehend them and impossible to enforce the usual Chinese responsibility on their families or villages.²¹ The pirate leader, Li Feng-kuang, "knew barbarian language thoroughly" and had worked for many years lightering barbarian goods on the Macao waterfront.

According to the memorial, neither Li Feng-kuang nor his fourteen accomplices were professional pirates or hardened criminals and the attack on the *Wabash* was an impromptu affair. Li Feng-kuang recognized the opium spread out on the deck and proposed to his *Tanka* friends who were fishing in the vicinity that they blackmail the captain by posing as revenueurs. When the *Tankas* came alongside, Li Feng-kuang "shouted to the barbarians [in English]²² that they were carrying prohibited opium and demanded hush money." The mate, called "Harry" in the Chinese account, refused and started to argue. Li Feng-kuang, who was already aboard the *Wabash*, "saw that the hold was stacked full of wooden chests, surmised that they contained silver," and decided to give up the pose of revenueur and become a pirate. He called to the others to come aboard and seize the chests. The American mate and the seamen "took up foreign swords to resist the seizure."

There follows a blow-by-blow account of the fight, describing just how and where each American was wounded and thrown into the sea. The Chinese had only bamboo poles, but they took the swords from the Americans and

¹⁹ The other groups were occupational: criminals, barbers, and actors.

²⁰ Couling, *Encyclopaedia Sinica*, p. 544.

²¹ *Ch'ing-tai Wai-chiao Shih-hiao*; *loc. cit.*

²² A British version definitely establishes the fact that the pirates spoke English, and supplies other details of interest: "... a Chinese Compradore's Boat went alongside [the *Wabash*] about 9 o'clock in the evening, and some of the Crew asserting in English that they were the Bearers of a Letter from the Captain (who had proceeded to Canton) they were permitted to come on board, when they suddenly attacked and quickly overpowered the Americans on deck; and having secured the rest of the Ship's Company, they plundered the vessel of valuable property and departed with their Booty, steering towards the Ladrone Islands. An officer and two seamen severely wounded in this attack were landed this morning and sent to the Portuguese Hospital." Quoted by H. B. Morse, *The East India Company*, Vol. III, p. 318.

used them effectively. When the fight was over the Chinese victors took to their boats and fled to a sandbank "where they opened up the chests and found that sixteen contained opium and two, silver, amounting to 5000 dollars. They divided up the silver but as the opium could not be brought into port, they dumped it and the two empty silver chests on the beach," where they were later recovered by the officials. The pirates then "rowed their own boats to an unfrequented cove, came ashore, and scattered." ²³

The Governor General accepted the argument of Consul Wilcocks, which was explained by the linguist, that Captain Gantt had no intention of entering port with the opium. The linguist reported that Gantt "had told him orally that it was his first trip to Canton to trade and he did not know that opium was prohibited. Just before he got into port he heard that it was illegal so he did not venture inside. Moreover, he said that the overseas Chinese (*pien kuei-tzu*) are fond of smoking opium and he could sell it elsewhere." ²⁴ This made sense to the Chinese officials and the Governor General was satisfied that there was no deception involved.

The penalties imposed on the fourteen culprits are carefully discussed and assigned, varying from immediate decapitation for the five found guilty of murder to banishment "4000 *li* to the frontier and be tattooed according to law."

The guilt of Captain Gantt for bringing opium to China was also considered. He was called "ignorant and rash" but determined not guilty. The Governor General decided that the recovered opium could not be returned to him but should be taken to the gate of the barbarian factories and burned, which was done. The American's "treasure," however, "which has been recovered will be restored and that not recovered must, according to law, be made good." This decision included repayment for the opium which was lost and that which was recovered and destroyed. Nevertheless Captain Gantt was advised to return to America and admonished never to return to China.

Finally, the Governor General recommended all the prefectural and district officials who participated in capturing the pirates and recovering the loot for Imperial recognition and reward. The pirate chief's deposition and the translation of Captain Gantt's statements were forwarded to Peking with the memorial.

In a supplementary memorial under the same date, ²⁵ Governor General Chiang Yu-hsien, apparently anticipating that his decision to clear Captain Gantt of all smuggling charges would be challenged by the Court at Peking, presented further evidence of his innocence. First, the Canton Customs House register had been examined and Gantt's name did not occur. "Thus his statement that it was his first trip to Canton and that he was not

²³ *Ch'ing-tai Wai-chiao Shih-liao*, loc. cit.

²⁴ *Ibid.*

²⁵ *Ch'ing-tai Wai-chiao Shih-liao*, *Chia-ch'ing* series, Ch. 6, pp. 45b-46a.

cognizant of the law is indisputable." Second, the Americans were the Number Two trading people at Canton (the English were Number One) and had always been respectful and compliant. Third, the United States was in a special category because of the peculiar nature of its government, its peculiar institution of the electoral college, and its *laissez-faire* policy regarding trade:

These barbarians have no sovereign (*chu*) and have only a head man (*t'ou-jen*); each tribe selects several persons who draw lots and serve in rotation for four years each. In matters of trade, each individual is allowed to put up capital and do business without any control or commission from their head man.

Fourth, Li Feng-kuang had no authority to arrest Captain Gantt in the first place and had then turned pirate and committed murder. Consequently, the discovery of the opium was accidental and Captain Gantt was guilty of no crime. The Governor General made clear, however, that "if the said barbarian had dared to bring his opium into port and officials had seized it and inflicted casualties, there would have been no redress and besides the said barbarian would have been punished for violating the prohibition." The fact that Gantt's ship did carry opium was justification for sending him away and warning him never to return. The Governor General was happy to state that Captain Gantt had now left Canton for home.

The Emperor expressed his approval of the punishment of the pirates by a vermilion comment (*i.e.* a personally scribbled note in the Emperor's own hand) in the text and endorsed the original memorial with a routine commitment to the Board of Punishments for appropriate action.²⁶

The supplementary memorial, however, went too far in catering to foreigners and came too close to nullifying the Imperial prohibition of opium. The Emperor presumably expressed his disapproval orally to the Grand Councillors, who presented the memorial in audience, and endorsed the supplement with an order to "draft a separate edict."

The Imperial Edict, dated August 10, 1817, is addressed to Governor General Chiang Yu-hsien.²⁷ It is a blast in no uncertain terms charging that Captain Gantt should have been punished for carrying opium, that indemnification for the opium was an error, and insisting that the Americans at Canton be specifically notified that hereafter the opium prohibition would be strictly enforced. The punishment of the Chinese culprits, it was clearly restated, was entirely proper. In conformity with this edict the specific notice to the Americans of the Imperial prohibition of opium smuggling, noted above, was sent through the Hong merchants to Consul Wilcocks September 23, 1817.

Besides the obvious relevance of this *Wabash* case to the opium question,

²⁶ The Imperial endorsement is dated Aug. 10, 1817, indicating a twenty-two-day interval between the dispatch of the memorial from Canton and its consideration at the Court in Peking.

²⁷ *Ch'ing-tai Wai-chiao Shih-liao*, *Chia-ch'ing* series, Ch. 6, pp. 47a-47b.

there are a number of points which bear on the question of extraterritoriality, or more specifically, the competence of China's police and judicial system. First, it is clear that the Americans found the Chinese officials prompt and vigorous in the capture and punishment of the culprits, beyond their reasonable expectation; second, the Americans found the local officials lenient toward their own questionable conduct, certainly with no anti-foreign tendency. Third, Chinese justice meted out to Chinese was stern but discriminating. There is no indication of blanket charges and wholesale execution. Fourth, the Chinese officials did not insist on responsibility of family and village in this case involving boat people or *Tankas*, but dealt with their guilt on an individual basis. It does not necessarily follow, but might be argued, that the Chinese might see the *rationale* of relieving other groups, *e.g.*, Americans and British, from group responsibility. Fifth, and finally, the Chinese judicial practices, although not specifically described in these memorials, show both differences from, and similarities with, Western practices: (1) magistrate-type trial instead of jury trial; (2) extensive use of signed depositions by both accusers and accused and lesser use of witnesses; (3) emphasis upon signed confession; (4) elaborate use of material evidence, such as the lethal weapon used in the crime and the captured loot of the robbers; (5) careful reporting of criminal cases to Peking, personal scrutiny of these reports by the Emperor, and review of the acts of the provincial officials by the Grand Council and appropriate boards in Peking.

Although all of these documents were not available to contemporary Americans, who could not be expected to regard the question objectively anyway, there is considerable evidence that American traders were not only "respectful and obedient" but regarded any insistence on extraterritorial and other special rights in China as high-handed and unjustified. It is only necessary to peruse contemporary trade journals in the United States to bear this out.²⁸ Americans were eventually convinced of the necessity of extraterritoriality, but there was a good deal of precedent against it, and many American traders and educators came to regard it as a mixed blessing.

EARL SWISHER

University of Colorado

THE IMPRISONMENT OF NAPOLEON: A LEGAL OPINION BY LORD ELDON

The library of the late Sidney G. Reilly of New York City contained many rare and costly Napoleonic items. When the collection was sold,¹ many of

²⁸ Cf. Niles Weekly Register (1818), Vol. 14, p. 309; (1822), Vol. 21, p. 405; Vol. 22, pp. 354-356, etc.

¹ See American Art Association, The Notable Collection of Mr. Sidney G. Reilly of New York and London. Literary, Artistic and Historical Properties Illustrative of the Life of Napoleon (New York, 1921), an auction catalogue. A copy of this catalogue is in the Norton Collection (see footnote 2, *infra*); see John Hall Stewart, France, 1715-1815: A Guide to Materials in Cleveland (Cleveland, Ohio, 1942), item 4209.

these were purchased by the late David Z. Norton of Cleveland, Ohio, and today they comprise part of the fine collection which bears his name.² One of the most interesting items thus obtained from the Reilly Collection was number 564 in the aforementioned catalogue. The description reads as follows.

Legal opinion by Lord Chancellor Eldon as to affixing the Great Seal to the Treaty for the perpetual imprisonment of Napoleon and the necessary abrogation of the Law of Nations. Contained in a lengthy confidential letter addressed to the Earl of Liverpool prime minister of Great Britain. With the Appendix (pp. 233-248) to the "Narrative of the Surrender of Buonaparte," published by Captain Maitland of H.M.S. Bellerophon in which he explains the Terms of Napoleon's Surrender. 1815. 8vo, full green crushed levant morocco, double gilt fillet borders on sides with small corner ornaments, "Napoleon," and 5 lines of title in gilt letters printed on front cover, gilt panelled back with gilt lettering, wide inside gilt and morocco borders, gilt edges, by Sangorski and Sutcliffe.

This essential description, which fails to do justice to the beauty of the binding and the hand-lettered title page (in red and black), is followed, in small type, by a more detailed explanation:

The Original Manuscript of the Legal Opinion of the Lord Chancellor of Great Britain to the Prime Minister of England, contained in a 12 pp. Signed Autograph Letter, marked "Private," dated "Encombe, Wednesday morning, 1815," addressed to the Prime Minister of England. The manuscript is fastened to 3 sunken mats, followed by a typewritten copy of the same, and the printed text of the "Appendix" inlaid to size.³

Of the Greatest Historical and Napoleonic Importance.

In this letter, the Lord Chancellor discusses the state of affairs in the most confidential manner possible, for the private information of the Prime Minister, the legal position being a very difficult one and without precedent. Eldon is obliged to advise that any Law of Nations to the contrary must be abrogated and that Napoleon be perpetually imprisoned for the safety and the general peace of the world at large. The British Government acting on the opinion given by Lord Eldon in this note conveyed the fallen Emperor to St. Helena where he was kept a prisoner till his death in 1821.

This most important historical manuscript is believed to be unpublished. The advice contained therein created a valuable precedent for future guidance, one which at rare intervals the world may need to take advantage of.⁴

² See John Hall Stewart, "The Norton Napoleon Collection," *The Journal of Modern History*, Vol. XXIII, No. 2 (June, 1951), pp. 158-162.

³ The typewritten copy is not accurate.

⁴ An examination of Eldon's published papers fails to reveal that the document has been published, though it is possible that it may have appeared in some other connection. The comment anent the future should be of interest to students of the fate of

Then, after a half-page of extracts from the letter, the description closes with the words, "The above is without doubt the greatest Legal Opinion of historical importance ever given, its effect excelling Cromwell's overthrow of Charles I and the 'Divine Right of Kings.'"

Even if the present writer were qualified (which he is not) to comment on the preceding evaluation of Lord Eldon's "Opinion," there is not space here for such purpose. The object of this note is simply to present, for students of the Napoleonic era in general and students of international law in particular, the letter itself, with such documentation as is unavoidable. Apart from the documentation, several matters of general interest should be noted. Napoleon is always referred to as "Buonaparte." Several personal notes enter in at the close of the letter, one of the most interesting being the request for a "living." The long postscript was added on the left inside page, and was written the wrong way of the page. And the last line was written across the top of the page and upside down.

Lord Chancellor Eldon⁵
To the Earl of Liverpool—Premier⁶

1815
Private

My dear Lord,

Lord Bathurst⁷ probably will have informed you that after hesitation,
late
I have determined to let the ^ Treaty for the Imprisonment of Buonaparte⁸

⁵ John Scott, First Earl of Eldon (1751-1838), was a noted English jurist. Member of Parliament in 1782, he became Solicitor General in 1788, and Attorney General in 1793. In 1799 he was appointed Chief Justice of the Court of Common Pleas, and two years later he entered upon the duties of Lord High Chancellor, which office he held almost continuously until 1827. Conservative to the point of being a reactionary, he was known as "the doubting justice," a reference to which fact appears in the present letter. Though undoubtedly influenced by personal sentiments in his attitude towards Napoleon, nevertheless his opinion shows a keen concern for legality of procedure. In view of the nature of this document, it is of interest that his brother, William Scott, Baron Stowell (1745-1836), a judge of the High Court of Admiralty, was an outstanding authority on maritime and international law.

⁶ Robert Banks Jenkinson, Second Earl of Liverpool (1770-1828), became a Member of Parliament in 1790. Foreign Secretary under Addington (1801-1803), Home Secretary (1804-1806 and 1807-1809), and Secretary for War and the Colonies (1809-1812), he became Prime Minister in 1812, and held that position until 1827. He was one of the principal advocates of having Napoleon sent to St. Helena.

⁷ Henry, Third Earl of Bathurst (1762-1834), succeeded Liverpool as Secretary for War and the Colonies in 1812, and held that portfolio until 1827.

⁸ On March 13, 1815, the Great Powers of Europe issued a declaration against Napoleon. This was prompted by his escape from Elba, and it stated that "Napoleon Bonaparte is excluded from civil and social relations, and, as an Enemy and Disturber of the tranquillity of the World, that he has incurred public vengeance" (Anderson, Frank M., *The Constitutions and Other Select Documents Illustrative of the History of France, 1789-1901* (Minneapolis: H. W. Wilson Co., 1904), p. 468). Some two weeks later, "In the name of the Most Holy and Undivided Trinity," they complemented this

have the Great Seal appended to it. Provided we make out that Maitland⁹ received him upon Terms, intitling us to consider him as a Prisoner of War, I don't think that any Objection can be successfully urged against that Act. And I have acted upon the Notion that such is the case. I don't mean to

so

say that I should not have \wedge acted, if that could not be made out, because, whatever difficulty there might be in finding a Principle, short of that, which rests upon Necessity, for imprisoning him not only until Peace, but after Peace, I am afraid we must look at as a case, in which Necessity will justify his Imprisonment even after Peace.

Notwithstanding every thing which has occurred to others & been communicated to me,

\wedge & all, that has occurred to myself, in Meditation here, I cannot bring myself, as yet, to think that, if this Person is to be considered as a French Subject & France at War with us, or a French Rebel & France at peace with us, he could, upon the general principles of the Law of Nations as applied to cases hitherto occurring in fact be, in the former Case, excluded from the benefits of a peace with France by perpetual subsequent Imprisonment, or be subsequently so imprisoned, if France, being at Peace

us

with us, had ceased to call upon \wedge as her Ally, to aid against her Subject in Rebellion—Peace with a Sovereign, it may be stated I believe as a general Truth, is Peace with all his Subjects—and the assisting a Sovereign at Peace against his subjects in Rebellion is what an Ally may do, at the Instance of that Sovereign, I believe it will be found to be generally true, that Allies can't treat the rebel to a foreign power, at Peace with the Allies, as their Enemy. And I incline to an Opinion entertained with more confidence than the doubting Lord Eldon usually holds Opinions, that, if Buonaparte is to be considered as a French Subject, his Imprisonment after Peace is rather to be justified upon his Case forming an Exception to stated

general rules of the Law of Nations than by any \wedge Rule of that Law—But then, may it not be so justified. Take him to be a French Rebel, we

declaration with a treaty, reinforcing their alliance against Napoleon, "until Buonaparte shall have been put absolutely beyond the possibility of exciting disturbances and of renewing his attempts to seize upon the supreme power in France" (Anderson, *op. cit.*, pp. 470-471). Waterloo sealed Napoleon's fate, and, following his "surrender" to Captain Maitland of H.M.S. *Bellerophon* on July 15, 1815, the British Government informed the Allies that it had decided to banish him to St. Helena. Unanimous in their approval of this plan, on Aug. 2 the Great Powers signed a treaty with Great Britain, committing Napoleon to her charge for such purpose. This is the treaty with which the present letter is concerned.

⁹ Sir Frederick Lewis Maitland (1777-1839), Commander of H.M.S. *Bellerophon*, to whom Napoleon "surrendered" on July 15, 1815, and who turned him over to the Commander of H.M.S. *Northumberland* for transportation to St. Helena. See Maitland's Narrative of the Surrender of Buonaparte . . . (London, 1826).

have, as to him, got beyond (have we not?) the Law "that to his Sovereign he standeth or falleth"—"that his Sovereign & not his Sovereigns Allies are to muzzle & to punish him"—to this his Sovereign is incompetent—but then it is said, if so, that must be, because the French Nation would rather have B. their Sovereign than L.^s 18. and, by the Law of Nations, you have no right to prevent that People from choosing their own Government. This I say I admit generally speaking, but we have got beyond these general Truths: we i.e. Parliament, as I conceive, has determined that this is a Case of Exception, because the safety of every other Country requires that the French Nation should not be permitted to act upon the general Rule—and, if that be so, can it be contrary to the Law of Nations, whatever are its general Rules, to allow you to interfere against the French Nation's having B—e as their Sovereign, that you should adopt (altho you are, or, if you are not, you will be at Peace with France,) that Measure which, & which alone, your are bonâ fide convinced can make your Interposition effectual—viz. the placing B—e in durance.—If the French Nation, by its disposal of Buonaparte, if he is a Subject of that Nation, could secure us & our Allies ag^t that Gentlemans machinations to destroy our Peace, I think it would be excessively difficult to justify, according to the Law of Nations, such a Treatment of him after Peace: but, may it not be said that all, that has been done, has been done upon the self-same principle, which is to be acted upon, if he is so treated viz. a bonâ fide, rational, sober Conviction, founded upon strong Argument tending to evince that this Im-
future & welfare
prisonment is of absolute necessity to the \wedge internal peace \wedge of ourselves & of our Allies.—

So far, taking him to be a French Subject, or a French Rebel: but is he so to be considered? What say you to that?

He was Emperor of France de facto—he abdicated that Character by Treaty—was he thereby, thereafter, to be considered as a French Subject to Louis 18th? Was that the effect of a Transaction, in which he became Emperor of Elba,¹⁰ with a stipulated Revenue—If, before the Emperor of

he was not a French Subject

Elba entered France, to regain the Throne \wedge
 does his Attempt to regain that Throne again make him a French subject, or a French Subject in rebellion—If, upon Grounds resulting out of the various situations & characters, in which B— has been placed, & with which he has been clothed, you can consider him as, in no way, in the relation of Subject, or subject in rebellion ag^t France, then may not the War be considered as a War against him, ag^t him as our Enemy, without reference to any Character, that he may be alledged to have, bound up in the national Character of France—against him & his adherents making, as an Enemy

¹⁰ Art. 2 of the Treaty of Fontainebleau, April 11, 1814, had permitted Napoleon to retain his titles and ranks for life (See Anderson, *op. cit.*, p. 450); nevertheless, he was *King, not Emperor* of Elba!

against us, an hostile Attempt to break down the System of Government, which existed in France, thereby introducing a System of Govt. in direct subversion of a Treaty with our Allies, founded upon their & our insecurity under any such Government as he would introduce into France? If we can make this out, (& does there not seem to be ground for saying that we can?) then might we not steer clear of the difficulty, that belongs to excluding from Peace with France or French Subject or a French Rebel? he

be
would then ^{be} a distinct, substantive Enemy, independant of any relation to the Sovereign of France, with whom we might be at Peace, or in Alliance? a conquered Enemy indeed, with whom, according to the Law of Nations, we should deal as mercifully as our Security would admit after he was conquered. But then we should only have to determine, as between ourselves & him, whether we did so treat, and the rules of the Law of Nations would be to be applied in the decision of that Question of fact, without reference to any Rule of that Law to him as a Subject of any Sovereign?

I do not know, my dear Lord, whether this long Scrawl is intelligible or nonsense

^ - —Just say in one word Yes or No, & how the Matter strikes you, if you have leisure to do so—

I assume in all my thoughts that Maitland has not made a Law of Nations for Buonapartes case by any improvident Measures, or rather thrown difficulties in our Way.

By Quiet, Air, & Exercise I have greatly amended. And, if I can be allowed to stay here next Month, I think I shall be more restored than I could have believed it possible that I ever should be. —

A Mr Singer, a Nephew of Lord Hoods, applied to me for the living of East Barnet, or, if it was in your Gift, requesting me to apply to you in his behalf: offering to give to me the living at Shrewsbury, to which I presented him, & where his wife's health won't allow him to reside. I declined making the Application to you who have the Gift: but I mention to you, in order to confirm that, if Lord Hood or he have applied to you, stating it—that, if you thought proper to give him the Living, I should take your Nomination to that, which he has—

I am, my dear Lord,

Y.^{rs} faithfully, Eldon

I am shocked at what is passing as to the Q. and D. of C, I have done all I could to prevent that Misery.

Encombe — Wednesday
morning

Buon^t was a Subject of France before he usurped the Throne. But he was Emperor of France de facto—If he simply abdicated that Imperial State, it might be said he continued his Character of Subject, not continuing his Rebellion—But, when you consider the effect of the whole Transaction

of his Abdication, & all the Circumstances of that Transaction, can you say that the fair effect of it was to restore him to the Character of Subject to Louis XVIII? Would it not have been extremely difficult, regard being had to all the Circumstances, in which he quitted France, to make out that his last Return to it was Treason ag^t Louis XVIII?

I shall write again soon.

JOHN HALL STEWART
Western Reserve University

ANNIVERSARY OF M. ALBERT DE LA PRADELLE

On March 30, 1951, Professor Albert Geouffre de La Pradelle, a great master of international law, reached his 80th birthday. All of us who have had the privilege to collaborate with him and enjoy the contact with his winsome personality, are happy to know that this scholar and philosopher of law is still among the first in the field. This, indeed, was the impression of all those who had the opportunity to meet him at the session of the Institute of International Law last September in Bath (England), and to see him studying new projects in Paris, Place Saint Sulpice.

Doctor of Law of the University of Paris since 1891, formerly professor at Grenoble and in Paris, he is now an honorary professor of the University of Paris and Director of the Institut d'Etudes et de Recherches Diplomatiques. Having been juriconsult of the French Foreign Ministry and of the Marine, he was designated by the Council of the League of Nations as a member of the committee which drafted the Statute of the International Court of Justice. Corresponding Member of the American Institute of International Law since its establishment; honorary doctor of Columbia University and the Universities of Budapest and Sofia; Member of the Society of Sciences of Finland, of the Royal Academy of Belgium, of the Academies of Spain, Coimbra, etc., he was Vice President of the Institute of International Law in Brussels (1923) and in New York (1929). M. de La Pradelle became an Associate Member of the Institute in 1904 and was elected full member in 1919. He was President of the International Law Association in 1936. Since 1920, he has been President of the Comité Juridique International de l'Aviation.

M. de La Pradelle is the founder and director of the *Revue de droit international* and the *Nouvelle Revue de droit international privé*; author of several monographs, viz., *Les Principes Généraux du Droit des Gens* (1928); *La Justice Internationale* (1936); *La Mer* (1937); *Les Grands Cas de la Jurisprudence internationale* (1938); *Maîtres et Doctrines du droit des gens* (1939, second edition, 1950); etc. He continues the publication of *Recueil des Arbitrages internationaux*, of which two volumes were published in collaboration with Nicolas Politis and the third volume is to come out in July this year.

He has translated into French several works of other eminent jurists, namely, *International Law*, by Lawrence (Oxford, 1920); *Law of Nations*, by Westlake (2 vols., Oxford, 1924); *The Hague Peace Conference*, by James Brown Scott (2 vols., Paris, 1926), etc.

Besides his own country, nine nations have awarded high decorations to this indefatigable fighter for justice and morality in the relations between men and nations. International life being the preferred theme of his meditations and exercises, he cultivates international law as a basis for the development of the individual. Teaching constitutional law or the law of nations, he treats of the state as the agent and not the aim, as an institution in the service of man. Just like intercourse between individuals in a civilized community, the ways in which one country contacts another shall be subject to the law of morality. In that M. de La Pradelle may be considered a disciple of the old Spanish jurist-theologians; but he also enjoyed the support and friendship of Americans like James Brown Scott and Nicholas Murray Butler, who put moral principles over science and politics.

While M. de La Pradelle's writings are characterized by a philosophy in which man and the development of his mind are made dominant, he makes a strong distinction between culture as enlightenment and humanity, and civilization as progress and refinement. Culture, he writes, requires thinkers, saints, and poets; civilization needs soldiers and workers. He believes with Pascal, that if it is difficult to make right powerful, power may become rightful. May he keep his faith!

KAAREL R. PUSTA, SR.

CORRECTION

The April issue of this JOURNAL carried on page 370 a note concerning the projected fourth session of the Mount Holyoke Institute on the United Nations to be held from June 24 to July 21, 1951. After the JOURNAL went to press a notice was received that the 1951 session of the Institute has been suspended because of lack of major financial support. The cancellation of the session was announced on April 6 by President Roswell Gray Ham of Mount Holyoke College, who stated that the decision not to hold the Institute was reached "with deep regret and the hope that funds may be available to reestablish the Institute shortly."

JUDICIAL DECISIONS

BY WILLIAM W. BISHOP, JR.

Of the Board of Editors

RESERVATIONS TO THE CONVENTION ON GENOCIDE. I.C.J. Reports, 1951, p. 15.

International Court of Justice, Advisory Opinion, May 28, 1951.

Advisory jurisdiction of the Court.—Objection based: on alleged existence of a dispute; on alleged exclusive right of the parties to the Genocide Convention to interpret it; on Article IX of the Convention.—Rejection of objection.

Replies limited to Genocide Convention.—Abstract questions.

Reservations.—Objections thereto.—Right of a State which has made a reservation to be a party to the Convention notwithstanding the objection made to its reservation by certain parties.—Circumstances justifying a relaxation of the rule of integrity.—Faculty of making reservations to the Convention; intention of the General Assembly and of the contracting States; high ideals of the Convention.—Criterion of the compatibility of the reservation with object and purpose of the Convention.—Individual appraisal by States.—Absence of a rule of international law concerning the effects of reservations.—Administrative practice of the League of Nations and of the United Nations.

Effect of the reservation: between the State which makes it and the State which objects thereto.—Application of the criterion of compatibility.

Objection made: by a State which has not signed the Convention; by a signatory which has not ratified.—Provisional status of signatory State.¹

The General Assembly of the United Nations on November 16, 1950, adopted a resolution,² which requested the International Court of Justice to give an advisory opinion on the following questions:

In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide³ in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification:

I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

II. If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and:

- (a) The parties which object to the reservation?
- (b) Those which accept it?

III. What would be the legal effect as regards the answer to Question I if an objection to a reservation is made:

- (a) By a signatory which has not yet ratified?
- (b) By a State entitled to sign or accede but which has not yet done so?

¹ Caption by the Court.

² This JOURNAL, Supp., Vol. 45 (1951), p. 13.

³ *Ibid.*, p. 7.

After referring to the procedural steps which had been taken, the majority of the Court⁴ stated:

In the communications which they have addressed to the Court, certain governments have contended that the Court is not competent to exercise its advisory functions in the present case.

A first objection is founded on the argument that the making of an objection to a reservation made by a State to the Convention on the Prevention and Punishment of the Crime of Genocide constitutes a dispute and that, in order to avoid adjudicating on that dispute, the Court should refrain from replying to Questions I and II. In this connection, the Court can confine itself to recalling the principles which it laid down in its Opinion of March 30th, 1950 (I.C.J. Reports 1950, p. 71).⁵ A reply to a request for an Opinion should not, in principle, be refused. The permissive provision of Article 65 of the Statute recognizes that the Court has the power to decide whether the circumstances of a particular case are such as to lead the Court to decline to reply to the request for an Opinion. At the same time, Article 68 of the Statute recognizes that the Court has the power to decide to what extent the circumstances of each case must lead it to apply to advisory proceedings the provisions of the Statute which apply in contentious cases. The object of this request for an Opinion is to guide the United Nations in respect of its own action. It is indeed beyond dispute that the General Assembly, which drafted and adopted the Genocide Convention, and the Secretary-General, who is the depositary of the instruments of ratification and accession, have an interest in knowing the legal effects of objections to such reservations.

Following a similar line of argument, it has been contended that the request for an opinion would constitute an inadmissible interference by the General Assembly and by States hitherto strangers to the Convention in the interpretation of that Convention, as only States which are parties to the Convention are entitled to interpret it or to seek an interpretation of its provisions of the Convention (Articles XI and XVI) associate the General Assembly take the initiative in respect of the Genocide Convention, draw up its terms and open it for signature and accession by States, but that express provisions of the Convention (Articles XI and XVI) associate the General Assembly with the life of the Convention; and finally, that the General Assembly actually associated itself with it by endeavouring to secure the adoption of the Convention by as great a number of States as possible. In these circumstances, there can be no doubt that the precise determination of the conditions for participation in the Convention constitute a permanent interest of direct concern to the United Nations which has not disappeared with the entry into force of the Convention. Moreover, the power of the General Assembly to request an Advisory Opinion from the Court in no

⁴ Pres. Basdevant; Hackworth, Winiarski, Zoričić, DeVisscher, Klaestad, and Badawi Pasha, JJ.

⁵ This JOURNAL, Vol. 44 (1950), p. 746.

way impairs the inherent right of States parties to the Convention in the matter of its interpretation. This right is independent of the General Assembly's power and is exercisable in a parallel direction. Furthermore, States which are parties to the Convention enjoy the faculty of referring the matter to the Court in the manner provided in Article IX of the Convention.

Another objection has been put forward to the exercise of the Court's advisory jurisdiction: it is based on Article IX of the Genocide Convention which provides that disputes relating to the interpretation, application or fulfilment of that Convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. It has been contended that there exists no dispute in the present case and that, consequently, the effect of Article IX is to deprive the Court, not only of any contentious jurisdiction, but also of any power to give an Advisory Opinion. The Court cannot share this view. The existence of a procedure for the settlement of disputes, such as that provided by Article IX, does not in itself exclude the Court's advisory jurisdiction, for Article 96 of the Charter confers upon the General Assembly and the Security Council in general terms the right to request this Court to give an Advisory Opinion "on any legal question." Further, Article IX, before it can be applied, presupposes the status of "contracting parties"; consequently, it cannot be invoked against a request for an opinion the very object of which is to determine, in relation to reservations and objections thereto, the conditions in which a State can become a party.

In conclusion, the Court considers that none of the above-stated objections to the exercise of its advisory function is well founded.

The Court observes that the three questions which have been referred to it for an Opinion have certain common characteristics.

All three questions are expressly limited by the terms of the Resolution of the General Assembly to the Convention on the Prevention and Punishment of the Crime of Genocide, and the same Resolution invites the International Law Commission to study the general question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law. The questions thus having a clearly defined object, the replies which the Court is called upon to give to them are necessarily and strictly limited to that Convention. The Court will seek these replies in the rules of law relating to the effect to be given to the intention of the parties to multilateral conventions.

The three questions are purely abstract in character. They refer neither to the reservations which have, in fact, been made to the Convention by certain States, nor to the objections which have been made to such reservations by other States. They do not even refer to the reservations which may

in future be made in respect of any particular article; nor do they refer to the objections to which these reservations might give rise.

The Court observes that this question refers, not to the possibility of making reservations to the Genocide Convention, but solely to the question whether a contracting State which has made a reservation can, while still maintaining it, be regarded as being a party to the Convention, when there is a divergence of views between the contracting parties concerning this reservation, some accepting the reservation, others refusing to accept it.

It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto. It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations.

This concept, which is directly inspired by the notion of contract, is of undisputed value as a principle. However, as regards the Genocide Convention, it is proper to refer to a variety of circumstances which would lead to a more flexible application of this principle. Among these circumstances may be noted the clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the Convention. Extensive participation in conventions of this type has already given rise to greater flexibility in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations—all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions.

It must also be pointed out that although the Genocide Convention was finally approved unanimously, it is nevertheless the result of a series of majority votes. The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations. This observation is confirmed by the great number

⁶ Here the Court repeated Question I.

of reservations which have been made of recent years to multilateral conventions.

In this state of international practice, it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain reservations. Account should also be taken of the fact that the absence of such an article or even the decision not to insert such an article can be explained by the desire not to invite a multiplicity of reservations. The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect.

Although it was decided during the preparatory work not to insert a special article on reservations, it is none the less true that the faculty for States to make reservations was contemplated at successive stages of the drafting of the Convention. In this connection, the following passage may be quoted from the comments on the draft Convention prepared by the Secretary-General: "... (1) It would seem that reservations of a general scope have no place in a convention of this kind which does not deal with the private interests of a State, but with the preservation of an element of international order . . . ; (2) perhaps in the course of discussion in the General Assembly it will be possible to allow certain limited reservations."

Even more decisive in this connection is the debate on reservations in the Sixth Committee at the meetings (December 1st and 2nd, 1948) which immediately preceded the adoption of the Genocide Convention by the General Assembly. Certain delegates clearly announced that their governments could only sign or ratify the Convention subject to certain reservations.

Furthermore, the faculty to make reservations to the Convention appears to be implicitly admitted by the very terms of Question I.

The Court recognizes that an understanding was reached within the General Assembly on the faculty to make reservations to the Genocide Convention and that it is permitted to conclude therefrom that States becoming parties to the Convention gave their assent thereto. It must now determine what kind of reservations may be made and what kind of objections may be taken to them.

The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a

denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th, 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

The foregoing considerations, when applied to the question of reservations, and more particularly to the effects of objections to reservations, lead to the following conclusions.

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in

making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.

Any other view would lead either to the acceptance of reservations which frustrate the purposes which the General Assembly and the contracting parties had in mind, or to recognition that the parties to the Convention have the power of excluding from it the author of a reservation, even a minor one, which may be quite compatible with those purposes.

It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention.

On the other hand, it has been argued that there exists a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties. This theory rests essentially on a contractual conception of the absolute integrity of the convention as adopted. This view, however, cannot prevail if, having regard to the character of the convention, its purpose and its mode of adoption, it can be established that the parties intended to derogate from that rule by admitting the faculty to make reservations thereto.

It does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law. The considerable part which tacit assent has always played in estimating the effect which is to be given to reservations scarcely permits one to state that such a rule exists, determining with sufficient precision the effect of objections made to reservations. In fact, the examples of objections made to reservations appear to be too rare in international practice to have given rise to such a rule. It cannot be recognized that the report which was adopted on the subject by the Council of the League of Nations on June 17th, 1927, has had this effect. At best, the recommendation made on that date by the Council constitutes the point of departure of an administrative practice which, after being observed by the Secretariat of the League of Nations, imposed itself, so to speak, in the ordinary course of things on the Secretary-General of the United Nations in his capacity of depositary of conventions concluded under the auspices of the League. But it cannot be concluded that the legal problem of the effect of objections to reservations has in this way been solved. The opinion of the Secretary-General of the United Nations himself is embodied in the following passage of his report of September 21st, 1950: "While it is universally recognized that the consent of the other governments concerned must be sought before they can be bound by the terms of a reservation, there has not been unani-

mity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State's objecting to a reservation."

It may, however, be asked whether the General Assembly of the United Nations, in approving the Genocide Convention, had in mind the practice according to which the Secretary-General, in exercising his functions as a depositary, did not regard a reservation as definitely accepted until it had been established that none of the other contracting States objected to it. If this were the case, it might be argued that the implied intention of the contracting parties was to make the effectiveness of any reservation to the Genocide Convention conditional on the assent of all the parties.

The Court does not consider that this view corresponds to reality. It must be pointed out, first of all, that the existence of an administrative practice does not in itself constitute a decisive factor in ascertaining what views the contracting States to the Genocide Convention may have had concerning the rights and duties resulting therefrom. It must also be pointed out that there existed among the American States members both of the United Nations and of the Organization of American States, a different practice which goes so far as to permit a reserving State to become a party irrespective of the nature of the reservations or of the objections raised by other contracting States. The preparatory work of the Convention contains nothing to justify the statement that the contracting States implicitly had any definite practice in mind. Nor is there any such indication in the subsequent attitude of the contracting States: neither the reservations made by certain States nor the position adopted by other States towards those reservations permit the conclusion that assent to one or the other of these practices had been given. Finally, it is not without interest to note, in view of the preference generally said to attach to an established practice, that the debate on reservations to multilateral treaties which took place in the Sixth Committee at the fifth session of the General Assembly reveals a profound divergence of views, some delegations being attached to the idea of the absolute integrity of the Convention, others favouring a more flexible practice which would bring about the participation of as many States as possible.

It results from the foregoing considerations that Question I, on account of its abstract character, cannot be given an absolute answer. The appraisal of a reservation and the effect of objections that might be made to it depend upon the particular circumstances of each individual case.

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The considerations which form the basis of the Court's reply to Question I are to a large extent equally applicable here. As has been pointed out above, each State which is a party to the Convention is entitled to appraise

⁷ Here the Court repeated Question II.

the validity of the reservation, and it exercises this right individually and from its own standpoint. As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention. In the ordinary course of events, such a decision will only affect the relationship between the State making the reservation and the objecting State; on the other hand, as will be pointed out later, such a decision might aim at the complete exclusion from the Convention in a case where it was expressed by the adoption of a position on the jurisdictional plane.

The disadvantages which result from this possible divergence of views—which an article concerning the making of reservations could have obviated—are real; they are mitigated by the common duty of the contracting States to be guided in their judgment by the compatibility or incompatibility of the reservation with the object and purpose of the Convention. It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application.

It may be that the divergence of views between parties as to the admissibility of a reservation will not in fact have any consequences. On the other hand, it may be that certain parties who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by the procedure laid down in Article IX of the Convention.

Finally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.

Such being the situation, the task of the Secretary-General would be simplified and would be confined to receiving reservations and objections and notifying them.

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The Court notes that the terms of this question link it to Question I. This link is regarded by certain States as pre-supposing a negative reply to Question I.

The Court considers, however, that Question III could arise in any case. Even should the reply to Question I not tend to exclude, from being a

⁸ Here the Court repeated Question III.

party to the Convention, a State which has made a reservation to which another State has objected, the fact remains that the Convention does not enter into force as between the reserving State and the objecting State. Even if the objection has this reduced legal effect, the question would still arise whether the States mentioned under (a) and (b) of Question III are entitled to bring about such a result by their objection.

An extreme view of the right of such States would appear to be that these two categories of States have a *right to become* parties to the Convention, and that by virtue of this right they may object to reservations in the same way as any State which is a party to the Convention with full legal effect, i.e., the exclusion from the Convention of the reserving State. By denying them this right, it is said, they would be obliged either to renounce entirely their right of participating in the Convention, or to become a party to what is, in fact, a different convention. The dilemma does not correspond to reality, as the States concerned have always a right to be parties to the Convention in their relations with other contracting States.

From the date when the Genocide Convention was opened for signature, any Member of the United Nations and any non-member State to which an invitation to sign had been addressed by the General Assembly, had the *right to be a party* to the Convention. Two courses of action were possible to this end: either signature, from December 9th, 1948, until December 31st, 1949, followed by ratification, or accession as from January 1st, 1950 (Article XI of the Convention). The Court would point out that the right to become a party to the Convention does not express any very clear notion. It is inconceivable that a State, even if it has participated in the preparation of the Convention, could, before taking one or the other of the two courses of action provided for becoming a party to the Convention, exclude another State. Possessing no rights which derive from the Convention, that State cannot claim such a right from its status as a Member of the United Nations or from the invitation to sign which has been addressed to it by the General Assembly.

The case of a signatory State is different. Without going into the question of the legal effect of signing an international convention, which necessarily varies in individual cases, the Court considers that signature constitutes a first step to participation in the Convention.

It is evident that without ratification, signature does not make the signatory State a party to the Convention; nevertheless, it establishes a provisional status in favour of that State. This status may decrease in value and importance after the Convention enters into force. But, both before and after the entry into force, this status would justify more favourable treatment being meted out to signatory States in respect of objections than to States which have neither signed nor acceded.

As distinct from the latter States, signatory States have taken certain of

the steps necessary for the exercise of the right of being a party. Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, or they would become effective on ratification.

Until this ratification is made, the objection of a signatory State can therefore not have an immediate legal effect in regard to the reserving State. It would merely express and proclaim the eventual attitude of the signatory State when it becomes a party to the Convention.

The legal interest of a signatory State in objecting to a reservation would thus be amply safeguarded. The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect and consequently, it would have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation. In the circumstances, it is of little importance whether the ratification occurs within a more or less long time-limit. The resulting situation will always be that of a ratification accompanied by an objection to the reservation. In the event of no ratification occurring, the notice would merely have been in vain.

For these reasons,

THE COURT IS OF OPINION,

In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide, in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification,

On Question I:

by seven votes to five,

that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

On Question II:

by seven votes to five,

(a) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

(b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention;

On Question III:

by seven votes to five,

(a) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

(b) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.⁹

⁹ Vice-President Guerrero, and McNair, Read and Hsu Mo, JJ., joined in a dissenting opinion which agreed that the Court was competent to give an opinion, but that Question I should be answered in the negative, and that Question II therefore did not arise; they also dissented from the majority on Question III. Their reasoning was briefly as follows: "The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance of the proposal of the reservation or at the same time or later. . . .

"... the practice of governments has resulted in a rule of law requiring the unanimous consent of all the parties to a treaty before a reservation can take effect and the State proposing it can become a party.

"the existing rule of international law, and the current practice of the United Nations, are to the effect that, without the consent of all the parties, a reservation proposed in relation to a multilateral convention cannot become effective and the reserving State cannot become a party thereto . . ."

Judge Alvarez, in a separate dissenting opinion based on "the new international law" following World War II, and the novel character of conventions which he termed "the new international constitutional law," arrived at by majority vote, and which if "signed by a great majority of States ought to be binding upon the others, even though they have not expressly accepted them," held that such conventions as that on Genocide "by reason of their nature and of the manner in which they have been formulated, constitute an indivisible whole. Therefore, they must not be made the subject of reservations, for that would be contrary to the purposes at which they are aimed, namely, the general interest and also the social interest." He would answer the first question "No," urging that the Genocide Convention cannot admit of any reservations, and that "even if they were allowed, they should produce the minimum of legal effect in favour of the States making the reservation." He thought Question II then did not arise; and, as for Question III, that "legal effect must be given to objections made to reservations by a State" in the categories covered by paragraphs (a) and (b).

Treaties—interpretation and effect as local law

WARREN v. UNITED STATES. 71 Sup. Ct. 432; 340 U. S. 523.

U. S. Supreme Court, February 26, 1951. Douglas, J.

Petitioner seaman sought maintenance and cure from the United States as owner of the vessel on which he was serving when he went ashore at Naples in 1944 on shore leave, and fell from a balcony outside the window of a dance hall, where he had stepped out for a view of the harbor, sustaining serious injuries. The District Court awarded maintenance, but the Court of Appeals disallowed it. Reversing the Court of Appeals, and relying on *Aguilar v. Standard Oil*, 318 U. S. 724 (1943), this JOURNAL, Vol. 37 (1943), p. 677, the Supreme Court allowed maintenance, though the injury occurred while on shore leave and though it appeared that the seaman had been careless in leaning out from the balcony without examining the rod he held (which broke with him). The Court discussed the relationship of treaty to domestic law of the United States as follows:

The Shipowners' Liability Convention, proclaimed by the President Sept. 29, 1939, 54 Stat. 1693, provides in Art. 2:

"1. The shipowner shall be liable in respect of—

"(a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;

"(b) death resulting from such sickness or injury.

"2. Provided that national laws or regulations may make exceptions in respect of:

"(a) injury incurred otherwise than in the service of the ship;

"(b) injury or sickness due to the wilful act, default or misbehaviour of the sick, injured or deceased person;

"(c) sickness or infirmity intentionally concealed when the engagement is entered into."

Petitioner's argument is twofold. He maintains first that under paragraph 1 a shipowner's duty to provide maintenance and cure is absolute and that the exceptions specified in paragraph 2 are not operative until a statute is enacted which puts them in force. He argues in the second place that, even if paragraph 2 is operative without an Act of Congress, his conduct was not due to a "wilful act, default or misbehavior" within the meaning of that paragraph. . . .

There is support for petitioner's first point in the concurring opinion of Chief Justice Stone in *Waterman Steamship Corp. v. Jones*, 318 U. S. 724, 738. But we think the preferred view is opposed. Our conclusion is that the exceptions permitted by paragraph 2 are operative by virtue of the general maritime law and that no Act of Congress is necessary to give them force.

The language of paragraph 2, in its ordinary range of meaning, easily permits that construction. It is "national laws or regulations" which may make exceptions. The term law in our jurisprudence usually includes the rules of court decisions as well as legislative acts. . . .

The purpose of the Convention would not be served by the narrow meaning. This Convention was a product of the International Labor Organization. Its purpose was to provide an international system of regulation of the shipowner's liability. That international system was aimed at providing a reasonable average which could be applied in any country. We find no suggestion that it was designed to adopt a more strict standard of liability than that which our maritime law provides. The aim indeed was not to change materially American standards but to equalize operating costs by raising the standards of member nations to the American level. If the Convention was designed to make absolute the liability of the shipping industry until and unless each member nation by legislative act reduced it, we can hardly believe some plain indication of the purpose would not have been made. Much of this body of maritime law has developed through the centuries in judicial decisions. To reject that body of law and start anew with a complete code would be a novel and drastic step. Under our construction the Convention provides a reasonable average for international application. The definition of the exceptions itself helps provide the average, leaving the creation of the exceptions to any source of law which the member nations recognize. That view serves the purpose of the Convention and conforms to the normal meaning of the words used. Our conclusion is that both paragraph 1 and paragraph 2 of Art. 2 state the standard of liability which legislative and decisional law define in particularity.

The Court, however, found that though plaintiff was negligent, there was no wilful misconduct or its equivalent, such as would be required under American decisions to bar the remedy for maintenance and cure.¹

Naturalization—claim of exemption as neutral—treaty and statute

MOSER v. UNITED STATES. 71 Sup. Ct. 553; 341 U. S. 41.

U. S. Supreme Court, April 9, 1951. Minton, J.

Reversing the decision of the Court of Appeals, 182 F. (2d) 734, this JOURNAL, Vol. 45 (1951), p. 385, and reinstating the judgment of the District Court, 85 F. Supp. 683, this JOURNAL, Vol. 44 (1950), p. 196, the Supreme Court upheld the petitioner's right to be naturalized. Relying on the provision of the Treaty of 1850 between the United States and Switzerland that "citizens of one of the two countries, residing or established in the other, shall be free from personal military service," petitioner had sought draft exemption upon the advice of the Swiss Legation. The Court of Appeals had denied naturalization upon the ground that the Selective Service Act of 1940 provided that request for exemption by a neutral resulted in his permanent incapacity to become an American citizen. The Supreme Court said in part:

¹ Jackson and Clark, JJ., dissented on the ground that the injuries were not received "in the service of the ship." Frankfurter, J., dissented on the ground that the decision of the Court of Appeals that libellant's conduct was a "deliberate act of indiscretion" should not be disturbed.

That the statute unquestionably imposed a condition on exemption not found in the Treaty does not mean they are inconsistent. Not doubting that a treaty may be modified by a subsequent act of Congress, it is not necessary to invoke such authority here, for we find in this congressionally imposed limitation on citizenship nothing inconsistent with the purposes and subject matter of the Treaty. The Treaty makes no provision respecting citizenship. On the contrary, it expressly provides that the privileges guaranteed by each country to resident citizens of the other "shall not extend to the exercise of political rights." The qualifications for and limitations on the acquisition of United States citizenship are a political matter which the Treaty did not presume to cover.

Thus, as a matter of law, the statute imposed a valid condition on the claim of a neutral alien for exemption; petitioner had a choice of exemption and no citizenship, or no exemption and citizenship.

But as we have already indicated, before petitioner signed the application for exemption, he had asserted a right to exemption without debarment from citizenship. In response to the claims of petitioner and others, and in apparent acquiescence, our Department of State had arranged for a revised procedure in claiming exemption. The express waiver of citizenship had been deleted. Petitioner had sought information and guidance from the highest authority to which he could turn, and was advised to sign Revised Form 301. He was led to believe that he would not thereby lose his rights to citizenship. If he had known otherwise he would not have claimed exemption. In justifiable reliance on this advice he signed the papers sent to him by the Legation.

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There is no need to evaluate these circumstances on the basis of any estoppel of the Government or the power of the Swiss Legation to bind the United States by its advice to petitioner. Petitioner did not knowingly and intentionally waive his rights to citizenship. In fact, because of the misleading circumstances of this case, he never had an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law. Considering all the circumstances of the case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness. . . . To hold otherwise would be to entrap petitioner.

Treaties—interpretation—international air transportation

GREY v. AMERICAN AIRLINES, INC. 1950 U. S. Av. R. 507.

U. S. District Court, S. D. N. Y., Dec. 21, 1950. Noonan, D. J.

Plaintiffs sued defendant airline for the wrongful death of their parents killed when approaching Dallas on a flight from New York to Mexico City, and moved for summary judgment, challenging the defense based on the Warsaw Convention of 1929 (49 Stat. 3000) limiting liability of a carrier engaged in international air transportation. Plaintiffs claimed that the flight was not international transportation within the Warsaw Convention, that the parties had not intended to consider the flight as covered by the

Convention, and that defendant had failed to comply with the strict requirements of the Warsaw Convention, since the ticket did not specify Washington and Dallas as the agreed stopping places. Rejecting the motion for summary judgment, the court found that the deceased were in international transportation since their tickets were from New York to Mexico City, and said: "I do not find persuasive plaintiffs' argument that a single plane engaged in a single flight may not be international in respect to some passengers and domestic as to others," who were leaving the plane at Dallas. As for the intention, there was no basis for holding that the Convention applied only when the parties contracted for or expressly assented to its application.

Article 3 of the Convention provides:

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars: . . .

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character; . . .

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Regarding this, the court said:

Plaintiff contends that under subsection (2) the carrier is, therefore, not entitled to avail itself of those provisions of the convention which limit its liability. However, subsection (2) merely denies limitation of liability where the carrier accepts a passenger without delivering a ticket to such passenger. Thus the question arises whether Article 3(2) means that unless a ticket with all the particulars as set forth in Article 3 (1), is delivered, the carrier's liability is unlimited.

I believe the question can be best resolved by a reference to the terms of the Convention itself. Chapter II of the treaty is entitled "Transportation Documents" which consist of Passenger Ticket, Baggage Check and Air Waybill. Article 4 provides for the issuance of a baggage check and sets forth the particulars it shall contain. Articles 5, 6, 7 and 8 provide for the issuance of an Air Waybill and the particular items it shall contain. However, Article 4 (4) and Article 9 referring to the Baggage Check and Air Waybill, respectively (while quite patently drafted to accomplish the same purpose with reference to the carriage of Baggage and Air Freight as Article 3 (2) does in the case of passengers), employs language obviously different than that in Article 3 (2). Article 4 (4) denies a carrier the right to avail itself of limitation or exclusion of liability not only for failing to deliver a baggage check, but also if the check does not expressly set forth the particulars contained in (d), (f) and (h) of Article 4 (3). Article 9, relating to Air Freight, is similar in terms to Article 4 (4), for it

also requires, in addition to a delivery of the Air Waybill, the inclusion of certain specified particulars. Article 3 (2) merely requires that the ticket be delivered to the passenger and thus clearly differs from Articles 4 (4) and 9. I must conclude that this omission or difference is most significant. For I cannot agree with plaintiffs' argument that Article 3 (2) intends that the ticket delivered contain the items set forth in Article 3 (1), when those who drafted the treaty were so explicit in this regard in Articles 4 (4) and 9.

Further, while the ticket itself did not set forth the agreed stopping places, the ticket did provide that "agreed stopping places" would be those set forth on the ticket and/or shown in the carrier's time table as scheduled stopping places on the passenger's route.*

Sovereign immunity—taxation of state-owned consular premises

YIN-TSO HSIUNG v. TORONTO. [1950] 4 D.L.R. 209.

Canada, Ontario High Court, May 25, 1950, Smily, J.

The Chinese Consul General at Toronto sought a declaration that real property owned by the Government of China and used by the Chinese Consulate General was immune from rates and taxes levied by the defendant City of Toronto. The court granted the exemption, relying heavily upon the judgment of the Supreme Court of Canada in *Reference re Power of Municipalities to Levy Rates on Foreign Legations*, [1943] 2 D.L.R. 481. The court said in part:

The only difference, if it is a difference, is that this property is employed for public purposes as a consulate, purposes which may not be classed as diplomatic purposes. However, . . . the immunity of the property of a foreign state is not limited to the property of the diplomatic representative but applies to such property as a ship. Surely it would apply as much to the property of the foreign state used for public purposes by a Consul.

The basis of the principle seems to be that the foreign state is immune from *coactio*, direct or indirect.

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I have, of course, fully recognized that the *Reference* case in the Supreme Court of Canada and many of the authorities referred to deal with the property of a foreign Government occupied by an Ambassador or diplomatic representative but the *ratio decidendi* would appear to be as much that the property is owned by and used for the public purposes of the foreign Government as that it is occupied by the Ambassador or public Minister of the foreign Government, as indicated in the quotation from the judgment of Brett L. J. in *The Parlement Belge*, case, *supra*,² and which was quoted with approval in *Compania Naviera Vascongado v. 'Cristina'*, [1938] A.C. 485, by Lord Wright at p. 506, as mentioned in the judgment of Hudson J. aforesaid at pp. 513-4

* Also applying the Warsaw Convention, see *Pekelis v. Transcontinental and Western Air, Inc.*, 187 F. (2d) 122 (Ct. App. 2d, Feb. 15, 1951).

¹ 5 P.D. 197 (1880).

D.L.R. . . . and which I repeat here: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.'"

I am therefore of the opinion that the property of a foreign state occupied by its Consul and used for the public purposes of such state are not liable to taxation by municipal corporations in this Province.

Sovereign immunity—foreign state interested in inheritance within forum

ÉTAT ROUMAIN *c.* DLE. ARICASTRE. 1950 Sirey, I, 2, p. 141.¹

France, Cour d'Appel of Poitiers, June 16, 1949.

Micheil, a Rumanian national, died in Rumania in 1936, leaving a large fortune to the Rumanian state by will for designated charitable purposes. Certain of the properties bequeathed were in France, and were claimed by a friend of the decedent, who brought the question of decedent's property in France before the French court. Thereafter the friend and the Rumanian state entered into a compromise as to most of the property in France, leaving a small portion in the hands of the court. Despite the objection of the Rumanian state, the civil tribunal of Bordeaux took jurisdiction of the case, relying on Article 14 of the French Civil Code, which declares the French courts competent over suits brought by a French national against even a non-resident alien defendant for obligations contracted with plaintiff either in France or abroad. This judgment was affirmed by the Cour d'Appel of Bordeaux, but on appeal by the Rumanian state the Cour de Cassation annulled the decision below and referred the case to this court for final decision. The Rumanian state maintained its objection to French jurisdiction.

Relying upon the principle of "the reciprocal independence of States," the court accepted the defendant state's appeal, and declared the French courts without jurisdiction to hear such a case against a foreign state. The court said that "A government cannot be subjected, for the undertakings which it has contracted, to the jurisdiction of a foreign state," and that:

It belongs, not to internal law but to international law, to determine in how far a foreign state may be subject to the jurisdiction of another state. . . . It is a principle of international law that generally a

¹ With doctrinal note by J.-P. Niboyet, doubting whether this case will be followed in matters relating to inheritances.

foreign state is free from the jurisdiction of the courts of another state. Even in cases where general principles would permit citing an alien individual before the French courts, a foreign state could not see imposed upon itself the jurisdiction of a French court, which would be the negation of sovereignty. It follows that a French national cannot avail himself of Article 14 of the Civil Code against a foreign state, and that in such cases French courts lack jurisdiction.

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For the application of the rule of immunity of foreign states from jurisdiction, the sole prerequisite is that the government invoking the immunity establishes its legal existence as a person of international law. When the sovereign nature of the state is undoubted, the controversies which it may have with French citizens fall without the jurisdiction of French courts, from whatsoever cause they may arise.

The judgment appealed from was wrong, in adopting the position that litigation involving only the civil or commercial interests of a foreign state is not covered by the principle of immunity from jurisdiction. That thesis, rejected by the majority of writers and of decisions, would result, as someone has said, "in a dualism in the State which is in contradiction with the concept of state personality and with the principle of reciprocal independence of States."

Finally, the court pointed out that the decedent had picked the Rumanian state as his heir since only the state through its public powers could carry out his wishes with respect to charitable establishments, and that therefore the Rumanian state was acting in its sovereign capacity in all matters relating to the inheritance.

Treaties—effect as domestic law—stateless refugees

MINISTÈRE PUBLIC c. STE. PARNASSE-LARTIGAU. XXIX Revue Crit. de Droit Int. Privé 600 (1950).

France, Cour d'Appel of Pau, June 12, 1950.

The French law of October 28, 1946, excluded aliens from certain rights to reparation of war damages; however, reciprocal agreements between France and other states provided for eligibility to receive such payments. Relying on Article 14 of the Geneva Convention of October 28, 1933, on the Status of Refugees,¹ which read: "The enjoyment of certain rights and the benefit of certain favours accorded to foreigners subject to reciprocity shall not be refused to refugees in the absence of reciprocity," the court held stateless refugees entitled to reparation for war damage to their property. The court referred to Article 26 of the French Constitution² in saying:

¹ 159 League of Nations Treaty Series 199; VI Hudson, International Legislation 483, 489.

² See Lawrence Preuss, "Relation of International Law to Internal Law in the French Constitutional System," this JOURNAL, Vol. 44 (1950), pp. 641, 647.

the right of the stateless person is not solely determined by the particular internal law whose benefit he claims, but also by the general status which controls him, resulting from international conventions themselves sanctioned by French law.

CASES ON NATIONALITY AND ALIENS IN UNITED STATES COURTS

A Chinese "treaty merchant" entering the United States after 1924 under the treaties of 1880 and 1884 was held entitled to be naturalized, despite the contention that he was not admitted as an "immigrant" and that "non-immigrants" were ineligible for naturalization,¹ the court saying:

It is elemental that Congress, by statute, cannot vary or diminish rights created under a treaty, and the courts have consistently held that the various Immigration acts passed after the treaties with China . . . do not abrogate, nullify, or abridge the rights of Chinese to enter pursuant thereto.

The Treaty of 1884, in Article III, provides that "The provisions of this Convention shall not affect the right at present enjoyed of Chinese . . . merchants . . . of coming to the United States and *residing therein*". The words, "*residing therein*" indicate clearly the intention of the treaty making powers to provide for permanent residence or domicile in the United States on the part of Chinese merchants and the other classes therein enumerated.

Naturalization was granted an Austrian agricultural worker whose release from military service was sought by his employer during the war, and who personally stated that he could not fight against his brother, Ford, D. J., saying:

The extent of his conscientious objection was a refusal to fight against his own brothers, impressed unwillingly into the German army. In and of itself, this does not indicate a lack of attachment to the principles of the Constitution. The mere objection to service in the armed forces of the United States by an enemy alien does not indicate such a lack of attachment to the principles of the Constitution as to disqualify him from naturalization.²

¹ Petition of Kwan Shun Yue, 94 F. Supp. 804 (S. D. Calif., Dec. 29, 1950). Accord, *in re Jeu Foon*, 94 F. Supp. 728 (E. D. Ark., Dec. 20, 1950), involving children of treaty merchant. Service on foreign-flag vessels owned by foreign subsidiaries of an American corporation, which signed crews on and off in foreign ports, did not meet the residence requirements, *Petition of Bouboulis*, 94 F. Supp. 454 (E. D. La., Dec. 20, 1950). In holding that children born in China in 1943 and 1945 to an American father were citizens, though the father had left for China in August, 1940, at the age of 20 years and 7 months and could not return until after the war, the court held that the five year's "residence" by the father after reaching the age of 16 did not require continuous physical presence in the United States, *Wong Gan Chee v. Acheson*, 95 F. Supp. 816 (N. D. Calif., Feb. 16, 1951).

² Petition of Schmidinger, 95 F. Supp. 156 (D. Mass., Dec. 22, 1950).

In *Marcantonio v. United States*, 185 F. (2d) 934 (Ct. App. 4th, Dec. 16, 1950), it was held error to deny naturalization on the basis of criminal convictions prior to the five-year period preceding naturalization. Parker, C. J., said:

The learned judge below did not distinguish, we think, between considering evidence of crimes committed prior to the five year period as bearing upon the question of character within that period and denying a petition for naturalization on the basis of such crimes. The former is permissible for the reason that the judge may consider any proper evidence having reasonable tendency to prove or disprove good character; and the fact of petitioner's having committed serious crimes at any time during his life has a bearing on his character. It is not permissible, however, to base denial of naturalization on the commission of crimes prior to the five year period, for the effect of this is to add to the statute a condition which it does not contain.³

In several proceedings for declaratory judgments as to citizenship,⁴ the courts held that expatriation did not result from persons of Japanese ancestry voting in elections conducted in Japan in 1946 under the occupation authorities, stress being laid upon the duress to vote, and in some cases upon the notion that under the occupation Japan was not "foreign" within the meaning of the Nationality Act.⁵

³ *Ralich v. United States*, 185 F. (2d) 784 (Ct. App. 8th, Dec. 27, 1950), denied naturalization for lack of good moral character, when petitioner was shown to have operated houses of prostitution prior to the five-year period, and to have sworn falsely in regard thereto on her naturalization hearing. In *Johnson v. United States*, 186 F. (2d) 588 (Ct. App. 2d, Jan. 24, 1951), L. Hand, C. J., held good moral character to be lacking when a married petitioner had lived with a married woman not his wife, there being none of the "extenuating circumstances" within the rule of *Petitions of Rudder et al.*, 159 F. (2d) 695, this JOURNAL, Vol. 42 (1948), p. 214. In view of the Internal Security Act of 1950, a member of the Italian Fascist Party who broke with it in 1937 was held to have failed to show the requisite good moral character and attachment to the principles of the Constitution, *Petition of Tucci*, 187 F. (2d) 690 (Ct. App. 2d, March 14, 1951).

It was held that the Immigration and Naturalization Service could not indefinitely delay naturalization hearings, *Application of Weber*, 94 F. Supp. 376 (S. D. N. Y., Dec. 14, 1950). On false swearing in naturalization proceedings, see *United States v. Obermeier*, 186 F. (2d) 243 (Ct. App. 2d, Dec. 20, 1950).

⁴ Such action for declaratory judgment, under 8 U.S.C.A. § 903, was not prevented by the provision of the Immigration Act making decisions of a Board of Special Inquiry final on exclusion of aliens, *Mah Ying Og v. McGrath*, 187 F. (2d) 199 (Ct. App., Dist. Col.), Dec. 7, 1950). Regarding the right to return to the United States to testify in such proceedings, see *Mazza v. Acheson*, 95 F. Supp. 752 (N. D. Calif., Feb. 1, 1951), and *Look Yim Lin v. Acheson*, 95 F. Supp. 583 (N. D. Calif., Feb. 8, 1951).

⁵ *Haruko Furuno v. Acheson*, 94 F. Supp. 381 (S. D. Calif., Nov. 14, 1950), refusing to consider a letter of the Secretary of State or opinions of Government agents that Japan remained a "foreign state"; *Mitsue Masuko Kai v. Acheson*, 94 F. Supp. 383 (S. D. Calif., Nov. 14, 1950); *Seki v. Acheson*, 94 F. Supp. 438 (S. D. Calif., Nov. 22, 1950); *Fumi Rokui v. Acheson*, 94 F. Supp. 439 (S. D. Calif., Nov. 22, 1950); *Funiko Furusho v. Acheson*, 94 F. Supp. 1021 (D. Hawaii, Jan. 23, 1951); *Akio Kuwahara v.*

Reversing the action of the District Court⁶ which held 4315 renunciations of citizenship by persons of Japanese ancestry detained at Tule Lake and elsewhere to be void for duress, the Court of Appeals⁷ remanded the proceedings for determination of the individual loyalty of those whom the Government charged with having acted freely and voluntarily in renouncing American citizenship under § 401(i) of the Nationality Code. The court held, however, that mentally incompetent persons, and those under 21 at the time of renunciation, could not effectively renounce American citizenship under this provision and remained citizens. It said that courts "should be more vigilant than ever that the massing of 4315 plaintiffs in two suits does not conceal the facts as to such enemy minded renunciants." As to the competent adult renunciants, "the burden of proof is on each to show that he was brought to a condition of mind by his treatment while interned which destroyed his free action in renouncing." Referring to conditions at Tule Lake, Denman, C. J., added:

Because of the oppressiveness of this imprisonment by the government officials, a rebuttable presumption arises as to those confined at Tule Lake that their acts of renunciation were involuntary. . . .

This presumption requires the defendants to go forward with the evidence and produce evidence rebutting it. When such evidence is introduced, the presumption disappears, but the fact of the coercive conditions remains as a part of each plaintiff's showing to support his individual burden of proof.

He held that the District Court had erred in refusing to receive Government evidence against 448 of the plaintiffs, apparently because of its notion that the burden of proof had shifted to defendants.

Holding proper the deportation of a former officer of the Greek branch of the Communist Party in the United States, Swan, Ct. J., said:

Acheson, 96 F. Supp. 38 (S. D. Calif., March 5, 1951), abandoning the idea that Japan was not a "foreign state."

No expatriation resulted from service under duress in the Japanese Army: *Noburo Kato v. Acheson*, 94 F. Supp. 415 (S. D. Calif., Nov. 14, 1950); *Ozasa v. Acheson*, 94 F. Supp. 436 (S. D. Calif., Nov. 14, 1950). In *Repetto v. United States*, 94 F. Supp. 623 (N. D. Calif., Nov. 15, 1950), a person born in 1914 in the United States of an Italian father and taken to Italy in 1920 tried to return to the United States in 1937, 1941, and 1946; in each case the American Consul General refused to provide an American passport. It was held that no expatriation resulted from failure to return to the United States before reaching the age of 23 or within the specified period after the effective date of the 1940 Nationality Act.

⁶ 77 F. Supp. 806.

⁷ *McGrath v. Tadayasu Abo*, 186 F. (2d) 766 (Ct. App., 9th, Jan. 17, 1951). See also *Barber v. Tadayasu Abo*, 186 F. (2d) 775 (Ct. App. 9th, Jan. 17, 1951), reversing the decision below, 76 F. Supp. 664, where habeas corpus had been granted to prevent deportation of these renunciants. Here the Court of Appeals held that Congress did not have to authorize persons in the United States to acquire or retain Japanese nationality, such nationality depending on the law of Japan.

appellant urges that to deport an alien, who has resided here so long, merely because he belonged to the Communist Party twelve years ago violates constitutional prohibitions. The appellee replies (1) that the power of Congress to deport aliens at any time and for any reason it deems in the public interest is absolute; and (2) that even if the power to deport is not unlimited, its exercise in the case at bar does not contravene any provision of the Constitution. It must be conceded that a most persuasive argument both on principle and on authority has been advanced in support of the absolute power of Congress. A sovereign may exclude aliens altogether or may admit them on such terms as it chooses to impose. While an alien is allowed to remain here he is accorded certain constitutional protections but his license to remain is revocable at the sovereign's will; thereafter with respect to deportation he is entitled only to "procedural due process," that is, that he be given notice of the hearing and opportunity to show that he does not come within the classification of aliens whose deportation Congress has directed. . . .

Nevertheless it is unnecessary to rest decision upon . . . [this] principle. . . . The statute here is directed against those who have at any time confederated to overthrow the Government by force, and we hold that its present application is not unconstitutional. . . . This appellant joined the group voluntarily and at a time when membership in such an organization was ground for expelling him from the country. He served as an organizer in various cities. . . . He never voluntarily withdrew but was dropped from membership for reasons of party policy. He argues that his joining was permissible political activity because he was not found to have personally advocated overthrow of the Government by force. A sufficient answer is that there is nothing in the Constitution which imposes upon deportation officials the difficult and uncertain task of distinguishing between those members of a subversive group who individually advocate the forbidden course and those who do not. . . . Nor is it a valid objection that the ground of deportation is an act that occurred before the statute was adopted.⁸

Judgment for money loaned by plaintiff to defendant was upheld, despite the alleged invalidity of the loan since it was to enable creditor's

⁸ U. S. ex rel. Harisiades v. Shaughnessy, 187 F. (2d) 137 (Ct. App. 2d, Feb. 6, 1951).

Holding an indeterminate sentence in a reformatory the equivalent of imprisonment for more than one year for a crime involving moral turpitude, deportation was approved in U. S. ex rel. McMahon v. Neeley, 186 F. (2d) 846 (Ct. App. 7th, Feb. 1, 1951). Questions of deportation procedure were involved in U. S. ex rel. Jankowski v. Shaughnessy, 186 F. (2d) 580 (Ct. App. 2d, Jan. 29, 1951); and of right to bail in deportation cases, in Carlson v. Landon, 186 F. (2d) 183, and Stevenson v. Landon, *ibid.* 190 (both Ct. App. 9th, Dec. 16, 1950); Mangaoang v. Boyd, 186 F. (2d) 191 (Ct. App. 9th, Dec. 27, 1950); U. S. ex rel. Mavrokefalus v. Murff, 94 F. Supp. 643 (D. Md., Nov. 28, 1950).

Where Greek seamen were detained on a Greek vessel in an American port at the order of immigration officials, libels for false imprisonment were dismissed when brought against the ship, officers, and immigration officials involved, Papagianakis v. S. S. Samos, 186 F. (2d) 257 (Ct. App. 4th, Dec. 20, 1950).

Italian grandson to marry debtor's American granddaughter and thus escape deportation. Since the marriage was *bona fide*, its purpose to avoid deportation was not illegal; the court distinguished marriages which were mere pretenses, and added that marriage would not prevent deportation but merely afford grounds for appealing to the Attorney General's discretionary authority to suspend deportation. *Cirulli v. Licata*, 10 N. J. Super. 449, 77 At. (2d) 288 (Dec. 5, 1950).

The Supreme Court of California affirmed the decision that German or Austrian heirs of an American dying in California could not take personality by will, in view of § 259 of the Probate Code providing that rights of non-resident aliens to inherit depend on "a reciprocal right upon the part of citizens of the United States to take real and personal property." Such a right was found not to have existed in Germany or Austria after the outbreak of World War II, and thus the heir-at-law prevailed over the Alien Property Custodian who sought to enforce the rights of the foreign legatees. *In re Schluttig's Estate*, 224 Pac. (2d) 695 (Dec. 12, 1950).⁹

INTERNATIONAL COURT OF JUSTICE

Calendar as of June 15, 1951

1. Reservations to the Genocide Convention—General Assembly's request for an advisory opinion. Oral hearings completed April 14, 1951; Advisory Opinion rendered May 28, 1951. See above, p. 579.
2. Colombia-Peru—Haya de la Torre Case. By order of January 3, 1951, time-limits for the presentation of the memorial and counter-memorial were fixed, the latest to expire on March 15, 1951. Cuba intervened on March 13, 1951. Oral proceedings concluded May 17, 1951; Judgment rendered June 13, 1951.
3. United Kingdom-Norway—Fisheries Case. By order of January 10, 1951, the time-limit for the presentation of the Norwegian rejoinder was extended to April 30, 1951.
4. France-United States—Rights of American Nationals in Morocco Case. By order of November 22, 1950, time-limits for the presentation of documents of the written proceedings were fixed, the latest to expire November 1, 1951.
5. Greece-United Kingdom—Claim of Ambatielos. Application filed April 9, 1951.
6. United Kingdom-Iran.—Application of Convention of April 29, 1933, between Iran and the Anglo-Iranian Oil Company. Application filed May 26, 1951. Oral hearings opened June 30, 1951, on application for indication of interim measures of protection filed June 22, 1951.

M. O. H.

⁹ The fact that plaintiff was a non-resident alien did not preclude her attacking the validity of a divorce obtained by her citizen husband in another state, *Santangelo v. Santangelo*, 78 At. (2d) 245 (Conn., Jan. 9, 1951).

BOOK REVIEWS AND NOTES

Lehrbuch des Völkerrechts. Unter Berücksichtigung der internationalen und schweizerischen Praxis. Vol. I. By Paul Guggenheim. Basel: Verlag für Recht und Gesellschaft, 1948. pp. xxxix, 508.

This is the first of two volumes of a treatise on international law by the well-known professor of the *Institut Universitaire de Hautes Études Internationales* in Geneva. It consists of seven chapters dealing with: "The Foundations of International Law" (I), "International Law as an Order Superior to the State" (II), "The Methods of Creating International Law" (III), "The Personal," "Territorial" and "Temporal Sphere of Validity of the International Legal Order" (IV-VI) and "The Organs of International Law" (VII).

These headings, which cover in fact the whole field of positive international law generally classified as "law of peace," although so different from the headings traditionally used in textbooks, are obviously and intentionally taken from the specific language that Hans Kelsen created and introduced into the science of law. The author was, indeed, obliged to adopt Kelsen's terminology, for he follows very closely Kelsen's pure theory of law, which requires that terminology as its most appropriate means of expression. To Professor Guggenheim international law is, as it is to Kelsen, a "normative coercive order" (pp. v, 2 f.), there being no *a priori* limitation as to the subject-matters it may regulate (pp. v, 7). The concept of justice has no objective meaning, so that the science of international law must, therefore, be restricted to the description of positive law, thus avoiding any natural law tendencies (pp. 12 ff.). The "nomostatics," as Kelsen calls his theory of the structure of the legal norm, is reflected in the largest measure in Professor Guggenheim's work, to the point of his considering the delict not as a negation but as a necessary intra-systematic element of law (p. 3); while the "nomodynamics," as Kelsen calls his theory of the hierarchy of norms, serves our author as a means of conceiving of the international legal order as emanating from a hypothetical basic norm which establishes custom as a norm-creating fact (p. 10).

Customary law is thus the first stage of the international legal order, followed by treaty law as the next stage (p. 55), and so on. To explain the choice of the basic norm the author has recourse to Kelsen's theory of the relationship of "tension" between the "ought" and the "is" (pp. 11 f.). If the author adheres to the postulate of "unity" of international and national law (pp. 21 ff.) and finds an answer to it in the "primacy" of international law (pp. 24 ff.), he obviously observes Kelsenian patterns,

although he denies the possibility, sustained by Kelsen, of a choice between the primacy of national and international law. Like Kelsen he sees as the characteristic of international law the fact that its norms are incomplete, insofar as they set forth the material element only and leave the determination of the personal element to national law (pp. 4 f.). He follows, too, Kelsen's opinion that general international law, as based in custom, is a primitive law which directs sanctions against other individuals than the perpetrators of delicts and is characterized by far-reaching decentralization, owing to the admissibility of self-help and the lack of any division of function between law-creating and law-applying (pp. 3 f., 446). Furthermore, Professor Guggenheim shares Kelsen's idea of the impossibility of law having gaps, and he demonstrates in the same way as Kelsen does the practical purpose of the fiction of *lacunae* (pp. 129 ff.). The author's statement that the recognition of a new state is a function of the international community, being exercised by the recognizing state in its quality of a decentralized organ of that community (pp. 181 f.), deliberately coincides with Kelsen's thought on this subject. The whole section on organs (Chapter VII) appears to be chiefly influenced by the teachings of the founder of the pure theory of law. Professor Guggenheim's belief that, according to a "natural" tendency, the establishment of an over-all international judiciary must precede that of a world legislative power (p. 18) is in line with Kelsen's "law of evolution." In very few points only do the author's views differ from those of Kelsen.

The emphasis laid in this review upon the fact that the distinguished professor of the Geneva Institute follows, with an almost orthodox faithfulness, Hans Kelsen's doctrines as the guiding lines of his treatise, is not intended to diminish the high specific value of the work. It is, on the contrary, a matter of praise that, having come to the conviction that Kelsen's teachings were right, he adopted them almost without reserve. Professor Guggenheim's great merit consists in systematically describing, in full conformity with Kelsen's general theory, the contents of positive international law. This is the first textbook of this kind, for although one must take into account Verdross' excellent *Völkerrecht*, it should not be overlooked that Verdross, while undoubtedly ranking among the most illustrious representatives of the Vienna School so closely linked with Kelsen's name, in numerous fundamental issues diverges from Kelsen's doctrine.

Professor Guggenheim uses Kelsen's scientific terminology, but he has a quite different style. He avoids abstract philosophical reasonings and long doctrinal argumentations. His diction is simple and easy to understand. These qualities will certainly help to make the book acceptable both to the broadest circle of young German-speaking students and to those scholars in other lands who, although fairly acquainted with the German language, too often are precluded from reading German works on law owing to the complexity of their phraseology. In contrast to this advantage there

is to be noted a certain over-systematization of the different subject-matters and an unduly minute subdivision of them.

A considerable part of the work is devoted to Swiss practice and legislation. Swiss literature is profusely quoted, and more than a hundred doctor's dissertations written by students of Swiss universities are referred to in the footnotes. This is indicative of the importance and high standard of the teaching of international law in Switzerland, for which Professor Guggenheim has already proved himself, by his important monographs and articles, to be one of those most responsible. The *Lehrbuch des Völkerrechts* is a brilliant confirmation both of the outstanding scholarship of the author and of the best scientific traditions of his country.

HANS KLINGHOFFER

International Law. The Collected Papers of Sir Cecil J. B. Hurst. London: Stevens & Sons, Ltd., 1950. pp. x, 294. Index. 30 s.

This volume was presented to the author by his friends as a mark of their esteem on his 80th birthday. International lawyers should be grateful to them for bringing together this collection of very stimulating, down-to-earth discussions by a former Legal Adviser of the British Foreign Office and Judge of the World Court. Though all but four of the papers were written in the period 1921-1929, they deal with many problems still unsettled today, some of them under current discussion. They show an incisive analysis and clarity of exposition which command respect and admiration of the reader. The volume is divided into four parts: presidential addresses before the Grotius Society and the Institute of International Law; articles published in the *British Year Book of International Law*; papers read before the Grotius Society; and lectures delivered at the Hague Academy.

Part One of the book contains two presidential addresses delivered in 1937 and 1944. The first deals with the nature of international law and why it is binding on states. The author develops the idea that its binding character is a necessary concomitant of statehood, which itself is the creation of international law; being subject to and bound by international law is a necessary consequence of being a state, and "there is no question of consent about it." This clears away the misconception of many writers that states are bound by rules of international law because they have consented to them in one form or another.

The second address considers the problem of codification of international law by states themselves or their representatives. After reviewing the futile conferences of 1909 and 1930, the author concludes that codification can only be successfully accomplished by a body such as the Institute working in a private and unofficial capacity. Even the World Court cannot accomplish the task, because its decisions on customary law (outside of

treaties) are so few. This paper was expanded in 1946 and the conclusion extended to the effect that the work should be done not on a purely individual basis but on both a national and international basis, that is, by national bodies under the co-ordination of an international body in order to avoid nationalistic tendencies; certainly the vast undertaking does not today, as it did seventy years ago, lend itself to accomplishment on an individual basis.

The effect of war on treaties, discussed in Part Two, depends, according to the author, on the intention of the parties rather than on the nature of the treaty itself. The next two papers and also a paper on the Continental Shelf in Part Three form a natural group bearing on the sovereignty or exclusive control beyond the low-water mark of the seashore. Sir Cecil Hurst holds from the precedents that the interior waters of a bay can by appropriation become part of the national territory, not territorial waters. This is to be presumed where the mouth of the bay is ten miles or less in width, but in the case of a larger inlet the line should be drawn across the bay in the part nearest the entrance where the width does not exceed 10 miles. The ownership of the soil beneath such national waters landward from such line is in the sovereign. As to how far the right of ownership in the submarine soil extends seaward, whether within or beyond the marginal belt, he concludes from the precedents and the Act of Parliament of 1858, that the proposition seems to be established that "within the 3-mile limit at least the bed of the sea below low water mark is vested in the Crown." On the theory that the wide claims to jurisdiction over the narrow seas have now lapsed by disuse, where those claims have been maintained by long occupation and usage (for example by exploiting the pearl, sponge, or oyster fisheries) ownership of the sea bed still continues beyond the marginal sea. In the same manner the sea bed may be subject to ownership by occupation and use as for mining and underground tunnels, but this pre-emption is not to conflict with the common right of navigation or of surface fishing. As to the continental shelf, the author discusses the international side of President Truman's Proclamation of September 28, 1945, and points out that the United States apparently intended to claim and exercise an exclusive right (believed to amount to sovereignty) to develop the resources in the sea bed, as, when and how it liked, whether within or without the 3-mile limit, but without extending sovereignty over the waters above. The author expands upon an interesting precedent in the agreement of 1942 between Britain and Venezuela regarding the Gulf of Paria, an expanse of shallow water some 70 by 50 miles between Trinidad and Venezuela. He proceeds to point out the practical difficulties inherent in the exclusive control and exploitation (sovereignty if you like) of the continental shelf beyond the marginal belt and underlying a *res nullius* of high seas.

Other papers are thought provoking but unfortunately space permits

only a few words about them here. On state succession in matters of tort the author, after careful analysis of the practice and principle involved, holds in effect that liability for tort dies with a state when it loses its personality by conquest or merger. In the article on the nationality of claims he discusses the bothersome question whether a claim is defeated if by transfer, descent or otherwise it becomes the property of a person of a third nationality, and particularly if this occurs after the protocol of arbitration has been signed or after the claim has been filed with the Commission or after the award has been made. The author punctures the theory that a claim is based on an injury to the state and may therefore be pressed against the respondent state even though it has meanwhile become the property of the respondent's nationals.

The author's article on diplomatic immunities in Part Two should be read in connection with the course of twelve lectures on Diplomatic Immunities which appears in Part Four. Together they form a pretty complete exposition of the whole subject including the origin of diplomatic missions and their protection, juridical basis and suggested restrictions, as well as the persons (and property) entitled, immunity from criminal and civil jurisdiction, waiver, servants, remedies, right of asylum, exemptions in third states and in time of war, and duration of the privilege. Throughout, the precedents, practice and principles are discussed and applied in a thorough and professional manner.

The little volume is a worthy token of esteem and regard for the honored and distinguished author.

L. H. WOOLSEY

Cases and Materials on International Law. By Edwin D. Dickinson. Brooklyn: The Foundation Press, 1950. pp. xxx, 740. Index. \$8.00.

This second casebook by Professor Dickinson will be welcomed by teacher and practitioner alike. In the preface he says "It is the aim of this casebook to provide materials suitable for an introductory law school course of not more than two or three semester hours," a short time in which to absorb 740 pages of heavy text. The new materials, structure, and viewpoint indicate that this is not a mere revision of his earlier work of 1929, but virtually a new book. Less than a fifth of the cases of the latter are repetitions and the international decisions are increased by two-thirds. A new feature is the absence of footnotes as such. The author's notes are inserted in the text and are "intended to be read." They contain helpful explanations and "references of substantial importance and interest."

Another new feature is the attempt to relate the "facts of international behavior to the development of legal solution." This is early emphasized in the author's note of several pages in Chapter I on the factual variations among nations in geography, resources, population, economy, polity and

culture, which have a decisive influence on national policy and international intercourse. In this relation the author might have propounded the question why most of the advanced nations have developed in the temperate zones.

A third feature is that under each topic the cases and materials are segregated under the headings "International Forum" and "National Forum" in the interest of clear thinking and avoidance of confusion. Thus it is possible to compare the international point of view on any topic with the national point of view, as shown, for example, by decisions of international tribunals and national courts.

A fourth feature strongly borne in upon this reviewer is the apparent change of viewpoint from the first edition. In the latter it seems evident that the purpose was to present as definitely as possible the approved current rules of international law. In the new edition, the method is less expository and more critical, and this is helped along by searching questions distributed in the notes. In short, the treatment is inclined to follow modern inquisitorial lines and not to accept complacently the dogma of authority.

While the first edition started off in the first chapter with the Nature and Authority and Persons of International Law, the new edition begins with the Community of Nations—theory, fact and organization, United Nations, World Court, and related bodies (Are international public bodies subjects of international law?). Next comes the International Sovereignty of a Nation—birth, recognition, independence and extinction. The materials under each topic are, as indicated above, separated under international forum and national forum.

Through the body of the volume are the familiar headings of international law with pertinent texts and decisions of an international and national character. Some of these, particularly nationality and immunities, are properly much reduced in size over the first edition. The subjects of war and neutrality are practically written off. The closing Chapters 7 and 8 have little counterpart in the first edition. Chapter 7 deals with the Adjustment of Differences—methods and procedures, adjudication, self-help (including, among others, the Corfu Channel case, the Nürnberg trials). Chapter 8 deals with International Co-operation in respect of the growth of international law through decisions and agreements (including codification) and by application to individuals (Genocide and Human Rights), as a fundamental step toward the ideal of World Government.

The volume is a convenient and useful collection of basic materials on international law and references to some of the pertinent literature, brought up to date, by a well-known master of the subject. It will bring a modern outlook into the teaching of international law.

L. H. WOOLSEY

Hugo Grotius: De Jure Belli ac Pacis Libri Tres. New German Text edited by Walter Schätzel. (Die Klassiker des Völkerrechts, Vol. I.) Tübingen: J. C. B. Mohr, 1950. pp. xxx, 650. Indexes. DM. 38.

Hugo Grotius, from childhood onward the "prodigy of Holland," in very young years counsel for the Dutch East India Company, later an exiled Dutch Protestant in Catholic France, then for long years Swedish Ambassador at Paris, died, in consequence of a shipwreck, while en route as Swedish Delegate to the peace negotiations at Osnabrueck. This many-sided man of genius had written innumerable works in many fields; his writings on international law are few in number. International law was hardly the center of his many interests. Yet the *De Jure Belli ac Pacis* has become his most famous work. Even if it is now recognized that international law did not spring from his head like Pallas Athena from the head of Zeus; that he was heavily indebted to famous predecessors, such as Victoria, Suárez Vázquez Gentili, and others; even if it must be admitted that his *magnum opus* can no longer serve as an authoritative treatise on international law actually in force, his work is of lasting importance, as Lauterpacht in a great study (*British Year Book of International Law*, Vol. XXIII (1946), pp. 1-53) has recently shown. The Library of the Hague Peace Palace possesses 225 editions and translations of this work.

In this country James Brown Scott inaugurated the "Classics of International Law" in which Grotius' work appeared in two volumes: the first giving a photographic reissue of the edition of 1646; the second, the English translation with Scott's important Introduction (pp. ix-xliii).

Now the German Academy of Sciences and Literature has inaugurated a German series of "The Classics of International Law," edited by Professor Walter Schätzel. The first volume—Grotius—has already been published, beautifully printed. The second volume—Victoria's *De Indis*—also translated and introduced by Schätzel will soon follow.

Professor Schätzel, a distinguished international lawyer of a truly international mind, is, from all points of view, particularly qualified for the task as editor and translator. He has dedicated his German translation of Grotius to that great German internationalist, Walter Schücking. Schätzel emphasizes the great importance of a new German translation: it is urgently necessary to dedicate the greatest interest to international law, to know the bases which the fathers have laid, and to build on those bases and bring the edifice to perfection. For the creation of a firm organization of states, based on a strong, supra-national law, is today the only means of salvation for the world. He rightly emphasizes that this task of re-editing the Classics of International Law is a truly European one, as they constitute a common treasure of all European nations. Schätzel always was a *bon Européen* in the sense of Briand. It fits in well with the European aspect of this undertaking that the publication of this volume has been liberally subsidized by the French *Éducation Publique*.

In his Introduction Schätzel gives a short biography of Grotius and a summary and evaluation of his works. He does not go into details as to the relation between this work and the *De Jure Praedae* as Fruin, and, following him, Scott had done. This problem of reappraisal was recently the object of a long study by Alison Reppy (*Fordham Law Review*, Vol. XIX (1950), No. 3, pp. 243-285). Schätzel then gives us the highly interesting Introduction which Christian Thomasius had written to the first German translation in 1707.

The three earlier German translations from the beginning of the eighteenth century were, merely for linguistic reasons, hardly of any great use. Likewise the fourth German translation, by Kirchmann, 1869, was not only out of print but suffered from defects and errors, as well from a lack of beauty and style, having followed too closely the Latin constructions. Schätzel's translation, based directly on the first text of 1625, is excellent. It is, as to the meaning, perfectly correct and exact, and, as to form and style, done in first-class German. The translator's high feeling for style and quality is shown by the fact that Grotius' quotations of verses are rendered also in metric form in the translation. The citations of Grotius are united at the end; careful work has been done here, making these citations fully understandable, and completing them, where necessary. This reviewer takes pleasure in congratulating Professor Schätzel on a task so well done.

In 1925, three hundred years after 1625, there were published an American translation, and a Spanish translation in Madrid. Now, in 1950, a new German translation and the first Japanese translation by Professor Masao Ichimata of Waseda University, Tokyo, have been brought out. Indeed it may be said: *Habent sua fata libelli*.

JOSEF L. KUNZ

Cases and Materials on World Law. Edited with notes by Louis B. Sohn. Brooklyn: The Foundation Press, 1950. pp. xxii, 1364. Appendix. Index. \$8.00.

This large work is devoted chiefly to international constitutional law with special reference to the United Nations and affiliated bodies.

No one knows so much about a book as the author, and he tells a great deal about this volume in the preface. It is the outgrowth of his course on World Organization at the Harvard Law School. The volume is composed of decisions and advisory opinions of the World Court, legal opinions of members of the Secretariat, the Charter and decision of the Nürnberg Tribunal, excerpts from debates in various organs, legislative and administrative decisions, resolutions and recommendations, as well as methods to implement and enforce them. The materials allow the student to trace the evolution and shifts in the powers and activities of the various organs of the United Nations.

The volume also contains materials on disarmament and control of atomic energy. The possibility of strengthening the United Nations by means of a grant of additional powers is explored throughout the book, including an analysis of various world government plans in the closing chapter.

The author is disconsolate over the handicap of space which necessitated omission of two-thirds of the materials originally prepared. Thus it was necessary to leave out the development of international government prior to the League of Nations, most of the League materials, as well as chapters on budget, secretariat, immunities, and many of the smaller agencies. The full texts of the basic documents (constitutions and the like) of the League, United Nations, International Court, and various international organs are gathered in the Appendix at the end of the volume, instead of scattered piecemeal throughout the ten chapters. "As a partial substitute for the many problems not covered in the case book, the editor has provided extensive notes" of explanation and of suggested readings.

Any summation of the contents of this monumental work would be futile and will not be attempted. Only some of the main features will be pointed out. The volume starts out with a General Bibliography of fourteen pages on World Law and Organization, International Law, World Politics, Federalism, World Unity, the Holy Alliance and Concert of Europe, Official Documents. The ten chapters deal with the General Competence of International Organs (methods of interpretation, exception of domestic jurisdiction), Membership, Rights and Duties of States, International Assemblies (composition and voting, functions and powers), Economic and Social Council (composition and powers, human rights, non-governmental organs), Non-Self-Governing Territories (Trusteeship Council, strategic areas, colonies), Security Council (voting and powers, settlement of disputes), Maintenance of Peace (enforcement under the League, armed forces for United Nations, disarmament, atomic energy, collective self-defense, Nürnberg trials, genocide), International Courts, Arbitration and Conciliation (development and jurisdiction), World Government (current proposals).

These topics are presented and illustrated by actual debates, proposals, resolutions and other official documents, frequently in relation to actual problems, such as forced labor, management of colonies, Indonesia problem, India and Pakistan dispute, etc. For example, the complaint of India as to the treatment of Indians in South Africa shows how a complaint is brought before the United Nations and how it is processed by the United Nations machinery to the point of a resolution of the General Assembly or other body. The documents speak for themselves without (for the most part) any explanatory text or summary.

Aside from its value as a classroom medium and reference book, it is a valuable contribution to a global view of the structure and ramifications of

the United Nations Organization. Particularly impressive is the wide range of its activities and how they impinge at many points on the spheres of the States Members. The question of domestic jurisdiction constantly obtrudes itself and has not been definitely settled. Nor is it likely to be settled generally while there is no agreed body to set the boundaries between state and United Nations functions. There is some tendency to use the agencies for purposes not intended by the drafters and to set up world-wide programs and régimes by which do-gooders attempt to settle domestic problems and standardize internal conditions everywhere by United Nations fiat or general convention. The volume demonstrates how these may lead to irritating inquisitions into many phases of state life heretofore regarded as exclusive. Where local governments have failed to achieve human perfection at home, there is little reason to suppose that universal agencies may succeed by giving every individual a treaty "right" to the full life and the four freedoms.

The author craves suggestions for reducing the size of the volume. This reviewer has found the long-winded debates (ranging from 10 to 30 pages) in various bodies repetitious and confusing. It would seem that these could be compressed or condensed with profit. It would seem also that the extensive bibliographic notes could well be reduced by being more selective. Chapter X might be left for the instructor to fill in, as its theoretical nature appears out of character with the rest of the volume, and seems related to the editor's notes on federalism and world unity at the beginning of the book. Perhaps the section on Preambles, Purposes and Functions in Chapter I could be omitted or compressed into a note.

L. H. WOOLSEY

Money in the Law: National and International. (Rev. ed.) By Arthur Nussbaum. Brooklyn: The Foundation Press, 1950. pp. xxxii, 618. Index. \$8.00.

International monetary and financial relations are the subject-matter of a rapidly growing body of rules of international law. These rules affect directly or indirectly the day-to-day transactions of states as well as their residents and nationals. Accordingly *Money in the Law* is a field which deserves careful study by the practitioner as well as the theoretician. Unfortunately, there is at present in this field of law too much law and too little order. Some of the reasons for the prevailing confusion are probably conflicting policy objectives of the laws in force as well as deliberate or involuntary lack of clarity of the relevant provisions. In the circumstances the second ("completely revised") English edition of Professor Arthur Nussbaum's *Money in the Law* (actually it is the third edition if one counts the German edition (1925) as the first edition of this standard work) is a most welcome and useful guide through the labyrinth of legal measures, theories and principles concerning "money" and related fields.

From a methodological viewpoint the book is extremely noteworthy. It covers virtually all levels of rules, namely, international law (with special emphasis on multilateral and bilateral agreements), constitutional law, statutory law, decrees and executive orders, as well as decisions by international and domestic courts. At the same time it is a study in comparative law; in the words of the author: "Monetary law offers an unusual and probably unique opportunity for comparative treatment because the fundamental problems which it raises for law-givers and courts are largely identical everywhere in modern civilization" (p. iv). It takes up conflict of laws problems relating to money and monetary obligations. It contains noteworthy sections on legal history, in particular, the Annex on "Legal History of the American Currency" (pp. 553-603) and the Section on "The Notion of World Money" (pp. 547-552).

The legal bases of money are of particular significance from the viewpoint of the "nominalist doctrine" of money. Adherents of the so-called "state theory of money," e.g., Knapp, *State Theory of Money* (abbreviated English translation, London, 1924), and in particular F. A. Mann, *Legal Aspects of Money* (London, 1938), emphasize the close relationship between money and law. For this school "Only those chattels are money to which such character has been attributed by law, i.e., by or with the authority of the State" (Mann, *op. cit.*, p. 10). Not only the nature of money, but also its value and its character as means of settlement of monetary obligations are determined by the state. By contrast Nussbaum is the protagonist of the "Societary Theory" of money on the ground that "in the phenomenon of money the attitude of society, as distinguished from the state, is paramount" (p. 8). However, this observer ventures the opinion that the conflict between the legal and the societary theory of money is not irreconcilable. Actually Nussbaum explores virtually all major legal aspects of money, but occasionally qualifies the legal approach by reference to certain social phenomena when, in support of the "societary theory," he states, for example, that money, although issued by the proper authority, may at times not be deemed acceptable by the public. In other words, the author's claim that he expounds a "societary theory" probably does not do full justice to the scope of his work; moreover, it is apt to stamp Nussbaum's approach as legally less precise than it actually is. It would appear that the author's approach is most appropriately designated as primarily a legal theory of money qualified by sociological, economical, and psychological considerations.

However that may be, the "state theory" as well as the "societary theory" of money agree that the "rule of nominalism" governs, in principle, domestic as well as international monetary obligations (p. 18). The "rule of nominalism" is of special significance in reference to domestic debts in case of devaluation (pp. 171-175). In reference to foreign money obligations the author states that "the triumph of the nominalistic rule in regard to foreign currency may be called universal" (p. 350).

Moreover, the scope of the "nominalistic rule" has been considerably extended by the recent practice of outlawing "gold clauses" in domestic and international contractual obligations. The author's discussion of the nature of gold clauses, the operation of gold clauses, as well as of the statutory and judicial restrictions of gold clauses (pp. 223-299 and pp. 414-445) is a masterpiece of juridical analysis of an extremely complex, but legally and economically, highly significant problem.

Nussbaum's discussion of the monetary system centers on the "ideal unit" whose value is more or less disconnected from its physical substratum (pp. 13-17). Accordingly, a modern monetary system is built upon an "ideal unit" and includes a number of corporeal money types which are expressed in terms of the "ideal unit." It is essential that appropriate fractions and multiples of the unit be represented by coins and/or notes (pp. 115-116). As is to be expected, the book includes a very informative treatment of the legally relevant characteristics of coins, paper money, and deposit money. As for "legal tender" the author stresses the private law character of the concept (pp. 45-46). Although the impact of "legal tender" provisions on private obligations should not be minimized, it seems that from the viewpoint of monetary legislation it is at times more significant that certain money pieces are designated as "legal tender" for public rather than for private debts. As to the territorial scope of monetary legislation, the author apparently ascribes little, if any, significance to the concept of "separate currencies" in the sense of Article IV, Section 9, of the Articles of Agreement of the International Monetary Fund, *i.e.*, "separate" currencies which "exist" in the metropolitan and non-metropolitan territory of members.

For the international lawyer the second part of the book (pp. 311-552) will be of special interest. The chapters on "Foreign Money" and "Debts in International Relations" abound with examples of recent court decisions taken from the judicial practice of many civil law and common law countries. Also, the decisions of the Permanent Court of International Justice in the Serbian and Brazilian Loan cases are discussed in great detail with reference to the question as to whether international law proper or private international law should have been applied.

A special section is devoted to "standardizing" and "stabilizing agreements." The former are designed to establish a common standard for coinage (kind of metal, fineness, weight, form, impress, etc.), while the purpose of the latter is to stabilize in the international money market the value of "ideal units" such as "dollar," "franc," and "pound." The so-called Latin Monetary Union of 1865 is considered the most significant example of standardizing agreements. The "Tripartite" agreement of September, 1936, originally concluded between the United States, Great Britain, and France, exemplifies a "stabilizing agreement." Moreover, the major legal and monetary implications of "pegging agreements," "clear-

ing agreements," and "payments agreements" are indicated (pp. 515-517). It should be noted that Nussbaum's definition of "payments agreement" as an agreement in which "a country under exchange control lifts its barriers to allow a limited outflow of money to the co-contracting country for the payment of debts" (pp. 515-516), although meaningful as such, does not correspond to current usage of the term "payments agreement"; rather it covers that type of agreement which occasionally is designated as "liquidation agreement." However that may be, there is considerable lack of agreement in theory and practice as to the precise meaning of the term. In accordance with the foregoing classification Nussbaum considers the Articles of Agreement of the International Monetary Fund as a combination of a "stabilizing agreement" with a "pegging agreement."

The Articles of Agreement of the International Monetary Fund are subjected to rather severe criticism, a criticism which is at times based on economic rather than purely legal grounds. The author holds that the Fund carries on, more or less with American money, the function of the American Stabilization Fund of the 1930's, that is, the support of weak currencies of friendly nations. He considers, furthermore, "control of the gold market as perhaps the most vital task of the Fund" (p. 536). He has no quarrel with these functions of the Fund or with its advisory and consultative activities. However, he criticizes the Fund Agreement on the ground *inter alia* that "for the first time a formidable mechanism of exchange control is being imposed upon independent states from the outside" (p. 546). Actually, nothing in the Fund Agreement requires members to maintain or introduce restrictions on payments for current transactions. All provisions of the Fund Agreement authorizing such restrictions are permissive rather than mandatory. Moreover, "elimination of foreign exchange restrictions which hamper the growth of world trade" (Article I (iv) of the Fund Agreement) is no doubt one of the primary purposes of the Fund. It is true that under Article VI, Sec. 1 (a) of the Fund Agreement the Fund may request a member to introduce control of capital transfers to prevent a large or sustained outflow of capital; and that the Fund may declare a member ineligible to use the Fund's resources if that member, after having received a request to impose controls of capital transactions, fails to exercise appropriate controls. It is doubtful, however, whether Nussbaum's broad objection is based on this narrow provision. In any event, no request has been made by the Fund up to now.

The provision of the Fund Agreement on unenforceability of certain exchange contracts (Article VIII, Sec. 2 (b)) is dealt with in great detail. The author is obviously aware of, but does not discuss, the formal interpretation of this provision by the Fund (see "Letter to Members on Unenforceability of Exchange Contracts," June 14, 1949, in *International Monetary Fund, Annual Report*, 1949, pp. 82-83), which states that

if a party to an exchange contract of the kind referred to in Article VIII, Section 2 (b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy (*ordre public*) of the forum refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement.

However, he contends that there still may remain certain conflict of laws problems involved in the unenforceability of exchange contracts which may require settlement in accordance with traditional conflict of laws rules (p. 544).

As for the effectiveness of the provisions of the Fund Agreement in domestic law, the author states rightly that this question can be solved only on the basis of the principles prevailing in each member state regarding the internal effect of international agreements (p. 532). Thus the Fund Agreement has to be "transformed" into domestic law only in those countries where the written constitution or constitutional usage requires legislative action to this effect. It appears that the author would agree, *e.g.*, with the ruling of *Attorney-General for Canada v. Attorney-General for Ontario* (1937), which reads:

Within the British Empire there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. (H. Lauterpacht, *Annual Digest and Reports of Public International Law Cases: Years 1935-1937* (London, 1941), p. 43.)

The author's statement that interpretations by the Executive Directors of the Fund under Article XVIII of the Fund Agreement "are not binding upon private persons, including subjects of member states" (p. 529), is, to say the least, highly debatable, especially in view of the provision of Article XX, Sec. 2 (a) of the Agreement which requires every member, in accepting the Fund Agreement, to set forth "that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement."

The constantly growing number and complexity of measures affecting international monetary and financial relations require most thoughtful analysis by lawyers and economists. Although both lawyers and economists are frequently called upon to interpret and to apply the same measures, lawyers and economists do not necessarily talk the same language. It is probably not an unfair generalization to say that economists are, in general, inclined to treat legal measures as "facts" and to ignore what they consider "legal niceties." Lawyers, on their part, with the exception of a comparatively small number of specialists, are apt to overlook the economic implications of these measures. However that may be, a clear

understanding of the basic legal issues involved is an indispensable prerequisite for a thorough understanding and effective administration of the major monetary and financial institutions. *Money in the Law* should greatly contribute to a clearer understanding of these issues.

In a field as complex and controversial as international monetary relations it can hardly be expected that everybody will agree on every point with Nussbaum's approach and conclusions. Nevertheless no serious student or practitioner in the field can afford to ignore the third edition of this standard work which embodies the results of more than twenty-five years of pioneering studies of its author.

HANS AUFRICHT *

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Indfødsretslovene (Nationality Laws). By Knud Larsen. Vol. I: Texts of Laws and Commentaries, pp. xvi, 432; Vol. II, Circulars and Reports, pp. 392. Copenhagen: Einar Munksgaard, 1948.

It seems that the time for large collections of nationality laws, like Zeballos, Hudson-Flournoy, or comparative tabulations, like Magnus, has passed. The modern trend is in the direction of the detailed analysis of particular nationality laws. The two volumes under review are a welcome contribution in this field. The author, Chief of Section, Danish Ministry of Interior, was in a position to use all the administrative material not otherwise available (courts have no jurisdiction over nationality in Denmark) and to present in the first volume the pertinent texts of Danish legislation from 1776 to 1946 with a running commentary. The literature on the subject in Danish and German and the legislative material were not neglected.

From the viewpoint of the international lawyer the sections dealing with the settlement of nationality problems with Iceland (before and after separation), Germany (in connection with the acquisition of South Schleswig) and the United States (U. S.-Danish Convention of July 20, 1872), as well as Scandinavian attempts to unify nationality legislation, will be of special interest.

The first volume is supplied with a painstakingly prepared index. The second volume, while dealing mostly with technical matters, is a valuable supplement to the first and is of interest for practitioners as well as for the student who wishes to go to the grass-roots and see how the laws operate in practice. This work is a competent and conscientious contribution to a problem of lasting interest. It is a pity that the author did not add a short *résumé* in English or French.

JACOB ROBINSON

* The views and opinions expressed are those of the reviewer and not necessarily those of the International Monetary Fund.

Traité de Droit International Privé Français. By J.-P. Niboyet. Paris: Recueil Sirey. Tome V, 1948, pp. 655; Tome VI, 1950, pp. 341. Tables.

These two volumes continue the monumental work of Professor Niboyet on *French Private International Law*. There will be a seventh volume and, later, a general index of the complete work. Volume V completes the treatment of voluntary obligations which, under the classification recognized at the time of the adoption of the French Civil Code, were more or less identified with contracts. The author here deals with the problem under the title of "Juridical Acts in Private International Law." This, of course, is a broader concept, as it embraces every manifestation of the will intended to produce legal consequences. The author excludes, however, all voluntary acts not entirely of a patrimonial nature, such as contracts of marriage, because these latter not only affect property relations but also the status of the contracting parties. These questions are dealt with later under the heading of "Extraterritoriality." This classification is confusing not only to Anglo-American readers but, we venture to say, also to many French lawyers. Niboyet explains that by the term "extraterritoriality" he means the application of the law of a foreign country to a fact which has effects in France, or to a fact which has effects in a foreign country under the law of a third. He explains further that his use of the term relates only to the creation of rights; in other words, to their origin under a foreign law, but not to their international effect (Vol. V, p. 239). Subjects dealt with under extraterritoriality are thus very largely matters of personal status and of acts and proceedings affecting personal status, such as marriage, divorce and separation, the capacity of persons to undertake particular acts and, as the author puts it, the "allegiance" of non-physical persons such as corporations and associations.

Volume VI is devoted to a subject of great importance which has been receiving much attention both by the Economic and Social Council of the United Nations as well as by unofficial international groups of lawyers and jurists. What is the effect of foreign judicial and arbitral decisions in the absence of any diplomatic treaty covering the matter? Here the author emphasizes that all decrees and judgments whether by a court or administrative body have no force or validity in France without a judgment giving executive force. For the ordinary judgment of a foreign court, the proceeding known as *exequatur* is required, but the author would make the proceeding much more difficult than the rules now recognized by French decisions. Reciprocity is not demanded by French courts, but the author recommends its adoption because certain countries, although not many, have adopted it. Indeed, the United States is one of these, at least in the Federal courts under the well-known doctrine of *Hilton v. Guyot*. Some of our State courts have preferred to refrain from judicial legislation and to retain the principles of the common law without demanding reciprocity. One is surprised to find the author bracketing the United States with coun-

tries not extending adequate recognition to foreign judgments simply because we do not have the procedure of *exequatur* (Vol. VI, p. 31). The author has misapprehended our procedure which creates a direct right of action on the foreign judgment itself. In practice this is more favorable to recognition than the French procedure.

More than half of Volume VI is devoted to a very useful analysis of treaties which France has ratified for the execution of foreign judgments and decisions. Some of these are bilateral, such as the Treaty of 1934 with Great Britain. The Geneva Protocols of 1923 and 1927 establish a treaty union of twenty nations for the execution of foreign arbitral decisions. The legal effects of these and other diplomatic agreements are discussed with clarity and insight most helpful not only to those interested in French positive law but also to diplomatic draftsmen in a field in which conventional regulation will play an increasingly important rôle.

ARTHUR K. KUHN

The Jewish Yearbook of International Law, 1948. Edited by N. Feinberg and I. Stoyanovsky. Jerusalem: Rubin Mass, 1949. pp. xvi, 304. \$8.00.

The struggle for a "Jewish National Home," the legal nature of the Mandate for Palestine and the establishment and recognition of the new State of Israel have given rise to significant and even unique problems in international law. Many of these are competently treated in the present first issue of the *Jewish Yearbook of International Law*, which contains sixteen essays and notes, all of which deal with topics of special interest to the Jewish people. Most students of international law will probably find of principal interest Professor Akzin's article on "The United Nations and Palestine," and Professor Lauterpacht's discussion of "The Nationality of Denationalized Persons," in which the learned author condemns certain decisions of English and Continental courts which, in dealing with the effect of German denationalization decrees, have restored compulsorily to individuals, or have held them involuntarily to, a nationality of which they have been divested. Professor Kelsen repeats a thesis which he has developed elsewhere, in charging that the London Agreement and the Charter of the International Military Tribunal illegally "declare as criminal acts which, at the time the rules concerned came into force, were either not illegal at all . . . or were illegal but did not involve the individual criminal responsibility of those who performed them in their capacity as organs of State. . . ." Forthcoming issues of the *Yearbook* will undoubtedly have a more general content; the present volume has exceptional value in collecting a wide range of material upon some of the most interesting legal problems of our time.

LAWRENCE PREUSS

NOTES

Yearbook of the International Court of Justice, 1948-1949, and 1949-1950. Edited by Edv. Hambro. The Hague: International Court of Justice; New York: Columbia University Press, 1949, 1950. pp. 164, 194. \$2.00, \$1.50. These two volumes follow a pattern, or table of contents, now conveniently established. Chapter I deals with the organization of the Court; Chapter II with its Statute and Rules; Chapter III with its Jurisdiction; Chapter IV lists the Meetings and Decisions; and Chapter V summarizes the Judgments, Advisory Opinions and Orders; Chapter VI is a useful Digest of Decisions in application of its Statute and Rules. Chapter VII explains and lists the publications of the Court, and Chapter VIII deals with the Finances of the Court. Chapter IX provides an extensive bibliography, which the reviewer was at first inclined to regard as extravagant, but now thinks is worth while. It covers not only the Court, but the United Nations and other international organizations, and may perhaps be the most complete bibliography available. The final chapter gives, under four headings, the texts governing the jurisdiction of the Court.

The *Yearbook* is a compact and useful guide to the work of the Court; its size increases as does the work of the Court. It contains information which could not be found elsewhere. The editorial work could be improved. The reviewer was puzzled as to whether there were two volumes when he found both prefaces dated July, 1949. The use of capitals and numerals in the table of contents (*e.g.*, for Chapter I) leaves the reader wondering which matters are regarded as principal and which subordinate. There has been, however, some improvement in this respect over previous volumes.

CLYDE EAGLETON

La représentation internationale en vue de protéger les intérêts des bel-ligérants. By Hamza Eroğlu. Neuchâtel: Imprimerie Richême, 1949. pp. 160. 9 Sw. Fr. This little book is a useful addition to the limited literature on the subject of third-party protection (or representation) of foreign interests. Dr. Eroğlu has studied with care all pertinent materials in English, French, and Italian, and his synthesis reveals the extent of international agreement on both the theory and practice of third-party protection. To be sure, there are a few national variations, and the author has described them accurately, but the degree of international accord on the subject (at least among the nations of the Western World) is highly significant.

The book is divided into six chapters as follows: (1) The Historical Evolution of International Representation in Time of War, (2) The Juridical Nature of International Representation, (3) The Bases of International Representation, (4) The Effects of International Representation, (5) The Scope and Application of Representation, and (6) The Administration and Termination of Representation. In developing these topics the author has relied heavily on earlier treatises on the subject, with the result that his presentation is more valuable for its documentation than for its originality.

In his brief conclusion Dr. Eroğlu raises the very provocative question as to how the practice of third-party protection or representation of belligerent interests can survive in a world in which the concept of neutrality

is fast becoming obsolete. He points out that if the United Nations attains its goal of universality, there will be no neutrals to serve as protecting Powers in the event of military sanctions against offending members of the international family. His thought, which is by no means academic in the light of the Korean conflict, is that if the search for collective security should eventually undermine the basis for neutral protection of belligerent interests, we should not fail to develop a substitute for this time-honored practice which has proved its ability to alleviate needless suffering and to maintain something of the fabric of international society even during hostilities. His suggestion is that attention might be given to developing a special organ of the United Nations which would act in cases of conflict as a "neutral" agency, discharging at least the basic functions of a protecting Power (*mesures conservatoires*) with respect to prisoners of war, civilian internees, official archives, and property rights.

WILLIAM M. FRANKLIN

International Law in Treaties. By Robert R. Wilson. (Publications of the Turkish Institute of International Law, No. 6.) Istanbul: I. A. Matbaasi, 1949. pp. 46. This pamphlet contains Professor Wilson's lectures given at the Faculty of Law of Istanbul in 1949. The author discusses treaties in relation to international law and policy and traces how treaties have affirmed established rules of international law as well as made new general law. An interesting chapter covers the effect of treaty waiver of rights and remedies under international law. Finally, the author develops the relation of treaty-made law to customary law and the recent impetus given in the United Nations to the codification and development of international law by scientific restatements and eventually by convention. In closing, the author points out the slight progress so far made toward making law (instead of force) the handmaiden of peace.

L. H. WOOLSEY

Rumania: Political Problems of an Agrarian State. By Henry L. Roberts. New Haven: Yale University Press, 1951. pp. xiv, 414. Appendices. Index. \$6.00. The volume written by Mr. Roberts is an attempt to approach the political problems of Rumania in the only way that permits the achievement of meaningful depth: through an analysis of the agrarian and, more specifically, the peasant issue. The result is an impressive study which not only offers a key to the understanding of Rumania, but could serve as a model for approaching the basic problems of predominantly agricultural Eastern Europe where the issues are, *mutatis mutandis*, the same and the solution would presumably have to be similar, if not identical. In the most general terms, the issue is that of adaptation of countries that cannot be classed with inert areas of the world taking their misery for granted, yet have thus far been unable to evolve a satisfactory formula for absorbing the impact of a Western industrial civilization and economy. The result, in the opinion of the author, was in Rumania the emergence of a society that was "a hybrid, monstrous in some respects" (p. 332). The most outstanding feature of this development was perpetuation of peasant misery, a fact of basic significance to a country where more than seventy percent of the total population engaged in agriculture and more than fifty percent of those tilling the land were,

from an economic point of view, "surplus." In a penetrating analysis of the political parties of Rumania, the author shows how meaningless the names and slogans mechanically borrowed from the West were in explaining the nature of the parties and their programs, and how inadequate their approach—including that of the special peasant parties—to the realities of the socio-economic situation of the country. The author's findings on the postwar situation are, of necessity, tentative, in view of the scarcity of information from behind the "Iron Curtain" and the still fluid nature of developments taking place in Rumania and elsewhere in the area under Soviet tutelage or pressure. Mr. Roberts believes that "the Soviet experience has instructive lessons to teach" (p. 349), since it comes from a country whose problems were more nearly comparable to those of Rumania than the experiences of the advanced West, but he doubts that the Communists really have the answer. The situation is further complicated by the danger that, instead of applying itself to a solution of Rumania's problems, the Communist régime may facilitate the exploitation of the country "for the benefit of the senior partner." In the long run, only the active and enlightened help of advanced countries can provide a healthy solution, which would have to avoid the temptation of "merely . . . installing Western procedural techniques."

While concentrating primarily on the basic agrarian problem, Mr. Roberts by no means neglects other aspects of recent Rumanian history, including international relations. With respect to the Big Three agreements of World War II and their impact on Rumania, he poses the question of the moral and political responsibility of the West. Here, too, the author's findings apply to the entire area now described as the "Soviet Orbit." There was, he points out, a kind of "logical injustice" in the twin demand for governments friendly to the Soviet Union and yet produced by "free and unfettered" elections. There was a basic incompatibility between these two postulates, especially in view of Stalin's standard of "friendship" which was, or, at least, should have been known. The discussion of this problem, although incidental to the main theme of the volume, is a valuable contribution to the analysis of the material—not merely formal—meaning and results of Big Three diplomacy, a problem that is not always discussed on a satisfactory level these days.

SAMUEL L. SHARP

BIBLIOGRAPHICAL MISCELLANY

While it seems wise to adhere to the principle that public documents, national and international, with the exception of the *Foreign Relations of the United States*, will not as a rule be reviewed in the JOURNAL, it also seems very fitting to take note of the appearance of the first volume of the *General Index of the Treaty Series* of the United Nations (Lake Success, 1950). The volume covers volumes 1 to 15 of the *Treaty Series* and runs to some 200 pages. It is elaborately indexed, by subject-matter as well as by countries, with ample reference to current problems. Special care has been taken to meet the needs of lawyers, diplomats, and students, and any such thing as a pure "library" approach has been avoided.

* * *

The Library of the Palace of Peace has continued its outstanding services to the science of international law by publishing an extensive annotated

bibliography of the printed works of Hugo Grotius, under the direction of our old colleague and friend, Dr. Jacob ter Meulen. The bibliography runs to over 700 pages and contains 10 plates, in royal octavo format. It is planned to publish in an early number of the JOURNAL a review by Jonkheer W. J. M. van Eysinga of this notable contribution.

* * *

Readers of the JOURNAL are aware of the reprinting of the *Digest of International Law* of our fellow member, Judge Green Hackworth. They may not have learned that arrangements have now been made for the purchase, direct from the Government Printing Office, of individual volumes to replace gaps in series already owned—or for any other reason.

Reprinting was expected to be completed by June 30. Complete sets of the *Digest* may be ordered from the Superintendent of Documents at \$25.00 a set. Single volumes are priced as follows: Vol. 1, \$3.50; Vols. 2, 3 and 5, \$3.25 each; Vol. 4, \$3.75; Vol. 6, \$2.75; Vol. 7, \$3.00; Vol. 8, \$2.25.

P. B. P.

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IRAN'S CLAIM TO THE SOVEREIGNTY OF BAHRAYN

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I. INTRODUCTION

The Oil Nationalization Act passed unanimously by both houses of the Iranian Parliament in March, 1951, raised once more the long-standing issue of Iran's claim to sovereignty over Bahrayn. The Iranian extremists, from both the left-wing *Tudeh* Party and the right-wing *Fida'iyan Islam* group, at first criticized Parliament for its silence about the oil of Bahrayn but, when the law for the expropriation of the Anglo-Iranian Company was enacted in April, they demanded that these laws should in like manner be applied to the Bahrayn Petroleum Company, jointly owned by the Standard Oil Company of California and the Texas Company, on the grounds that the Bahrayn Islands form a part of Iranian territory.

The question of Iran's claim to jurisdiction over the oil of Bahrayn was first raised when the Shaykh of Bahrayn granted a concession to a British company in 1930. The Iranian Government sent a note of protest to the British Government on July 23, 1930, denying the right of the Shaykh of Bahrayn to grant a concession for exploiting the oil resources of these islands without Iran's approval, on the grounds that "the Bahrayn Islands form an integral part of Persia [Iran], and that Persia possesses incontestable rights of sovereignty over those islands. . . ." ¹ This protest was followed by another to the United States Government on May 22, 1934, ² when an oil concession was granted by the Shaykh to the Standard Oil Company of California. The note stated:

According to information recently received by the Imperial Government [of Iran], a concession to exploit Bahrein oil has just been obtained by the Standard Oil Company of California, which has begun operations and has already extracted large quantities of oil.

I have the honour to draw your serious attention to the above and to inform you that the concession in question or any other concession acquired by the Standard Oil Company or any other company whatsoever—having been obtained, not from the Persian Government, whose rights of sovereignty over the Bahrein Islands are incontestable, but from legally incompetent authorities who have no right to grant such concessions—is regarded as null and void. My Government strongly

¹ For text of the note, see League of Nations Official Journal, September, 1930, p. 1083.

² *Ibid.*, August, 1934, p. 969.

protests against this concession and considers itself at liberty to claim and demand the restitution of any profit that may accrue from such concessions, as well as compensation for any damage that may result therefrom. . . .³

In view of the fact that Iran's claim to sovereignty over Bahrayn had been reiterated in the past on several occasions, it is likely that such a claim might be put forth again under favorable circumstances. After the second World War the issue was revived by Prime Minister Qawam as-Sultanah in 1946. He announced that all oil produced in Bahrayn and shipped to the Iranian mainland would be taxed at the same rate as that produced by the Anglo-Iranian Oil Company. If Iran's claim to the sovereignty of Bahrayn is valid, the Oil Nationalization Act, unless it specifically excludes Bahrayn or unless the Act by its terms applies only to the Anglo-Iranian Oil Company, must *ipso jure* apply to the Bahrayn Petroleum Company. While such claims have often been disregarded, they might assume a certain seriousness should the *Tudeh* Party seize power and, supported or inspired by Russia, seek excuses for intervention in the Persian Gulf by raising the question of Iran's claim to sovereignty over Bahrayn.

Before turning to a discussion of the validity of Iran's claim, a word on the geography of the Bahrayn Islands might be useful. The term "Bahrayn" (which means the "two seas") was originally applied to the continental coast of Arabia (al-Hasa), the peninsula of Qatar, and the group of islands which separate the bay between Hasa and Qatar into the "two seas." But this term came to be applied only to those islands which form the "two seas." The Bahrayn Islands are an archipelago of coral formation (except perhaps the rocky hills in the center of the largest island) which includes Bahrayn, the largest (it is 27 miles long by 10 wide), Muharraq (second in size, five miles in length, and situated to the north of Bahrayn), Sitrah, Umm Na'san and a number of smaller islands. This archipelago was famous for its pearl fisheries from antiquity and more recently for the oil resources which have been discovered since the first World War. Its strategic value may assume an increasing importance should Communism penetrate southward towards Iran, Iraq, and the Persian Gulf.⁴

³ The British Government had already objected to the grant of oil concessions to other Powers, but the United States State Department, pressing for equal opportunities for American interests, secured British agreement to the participation of American interests in the oil of Bahrayn. For an exchange of notes on this matter see *Papers Relating to the Foreign Relations of the United States, 1929, Vol. III* (Washington: Government Printing Office, 1944), pp. 80-82.

⁴ For the geography of the Bahrayn Islands, see J. Theodore Bent, "The Bahrayn Islands in the Persian Gulf," *Proceedings of the Royal Geographical Society*, Vol. XII (January, 1890), pp. 1-19; Captain A. W. Stiffe, "Ancient Trading Centers of the Persian Gulf, VII: Bahrein," *The Geographical Journal*, Vol. XVIII (September, 1901), pp. 291-294; Maynard Owen Williams, "Bahrein: Port of Pearls and Petroleum," *The*

II. THE CONTROVERSY BETWEEN IRAN AND GREAT BRITAIN OVER BAHRAYN

For over a century, from the time when Great Britain entered into treaty relations with the Shaykh of Bahrayn, Iran let pass no opportunity to make representations against the establishment of direct relations with the Shaykh by any foreign Power or to assert its own sovereignty over these islands. Probably the most important recent protest which Iran made was the one which it sent, to the League of Nations, under Article 10 of the League Covenant, on the occasion of the signing of a treaty between King Ibn Saud and Great Britain on May 20, 1927.⁵ Article 6 of this treaty⁶ stated:

His Majesty the King of the Hejaz and Nejd and its Dependencies undertakes to maintain friendly and peaceful relations with the territories of Kuwait and Bahrain, and with the Sheikhs of Qatar and the Oman Coast, who are in special treaty relations with His Britannic Majesty's Government.

This treaty caused a sharp note of protest to be sent by the Iranian Government to Great Britain on November 22, 1927,⁷ in which it was stated:

The Persian Government . . . protests emphatically against the part of the Treaty referred to, and looks to the British Government to take steps without delay to nullify its effects.

A copy of this note was communicated to the Secretary General of the League of Nations on November 23 with a covering letter⁸ stating:

This protest is communicated to you for the information of the States Members of the League of Nations, all of which are bound by the Covenant and, in particular, by Article 10, which guarantees the territorial integrity of each of them.

To this note Sir Austen Chamberlain, the British Foreign Secretary, replied on January 18, 1928, denying that "any valid grounds" exist upon which Iran could claim sovereignty over Bahrayn.⁹ This reply elicited another note from the Iranian Government, dated August 2, 1928, in which the Iranian viewpoint was emphatically reiterated; but to this Sir Austen

National Geographic Magazine, Vol. LXXXIX (February, 1946), pp. 195-210; Abbas Farouhy, *The Bahrein Islands* (New York, 1951); J. Oestrup, "Al-Bahrain," *Encyclopedia of Islam*, Vol. I, pp. 584-585.

⁵ This treaty, known as the Treaty of Jidda, was based on an earlier similar treaty signed by Ibn Saud and Britain on Dec. 26, 1915, but the earlier treaty did not elicit a protest from Iran.

⁶ British Parliamentary Paper (1927), Cmd. 2951. See also A. J. Toynbee, *Survey of International Affairs, 1928* (London, 1929), Appendix I, pp. 439-440.

⁷ League of Nations Official Journal, May, 1928, p. 605.

⁸ *Ibid.*

⁹ A copy of this letter was sent to the Secretary General of the League of Nations on Feb. 25, 1928, for communication to Member States of the League of Nations for information.

replied in a detailed note of February 18, 1929, in which the juridical and historical arguments of the Iranian Government were challenged. This controversy occurred at a time when the British and Iranian Governments were already in conflict over a number of other problems, such as the dispute over Shatt al-Arab with Iraq,¹⁰ Iran's relations with the Shaykh of Muhammarah, and Iran's desire to secure the abrogation of the Capitulations.¹¹ Some of these problems were later settled by negotiations; but for the conflict over Bahrayn, which for a century had been the subject of controversial discussion, no conclusive settlement was expected.

The argument of the Iranian Government in its notes of November 22, 1927, and August 2, 1928,¹² was based in the main on Iran's historical connections with, and an alleged recognition by Britain of its possession of, the islands. Iran claimed that the islands had "uninterruptedly" formed part of its territory, except during the Portuguese occupation from 1507 to 1622, and that their Shaykhs, since the expulsion of the Portuguese, "have always recognized Persian sovereignty." This historical claim, to which Iran attached great importance in its controversy with the British Government, will be briefly analyzed in the next section.¹³

Apart from its historical claims, Iran declared that the British Government had recognized in the past its sovereignty over Bahrayn. This alleged recognition seems to have been implicit, as indicated in the Iranian note, rather than explicit. The note of August 2, 1928, cited two documents in support of this contention.

The first was an agreement signed on August 30, 1822, between Captain William Bruce, representing the British Government, and the Prince-Governor of Shiraz, representing Iran. Though this agreement was at once repudiated by both governments on the ground that the two negotiators had signed it without prior authorization, it was regarded by the Iranian Government as an evidence of its possession of Bahrayn. "The historical truth," stated the Iranian note of August 2, 1928, "which plainly emerges from this agreement is the assertion and confirmation by Captain Bruce of the fact that the Islands of Bahrein then formed part of the Persian province of Fars." Captain Bruce, added the Iranian note, was in "an excellent position to know the facts," as they were then known. While Captain Bruce might have been ill informed about the reality of Iran's connections with Bahrayn—a possibility which was entirely overlooked by the Iranian Government when it asserted, without giving any evidence, that Captain Bruce was in a position "to know the facts"—he seemed to have

¹⁰ See Majid Khadduri, *Independent Iraq* (London, 1951), pp. 240-246.

¹¹ A. J. Toynbee, *Survey of International Affairs, 1925* (London, 1927), Vol. I, pp. 539-543; *ibid.*, 1934 (London, 1935), p. 223.

¹² For texts of these two notes, see League of Nations Official Journal, May, 1928, p. 605; *ibid.*, September, 1928, pp. 1360-1363. ¹³ See section 3, below.

had no authority to negotiate such an agreement, since it was promptly repudiated by the British Government.

The second document consisted of an exchange of correspondence between Lord Clarendon and Persia on the questions of piracy and slave trade in the Persian Gulf. In reply to Persia's assertion of its sovereignty over Bahrayn, Lord Clarendon stated on April 29, 1869, that:

The British Government readily admit that the Government of the Shah has protested against the Persian right of sovereignty over Bahrein being ignored by the British authorities, and they have given due consideration to that protest.

Not only was this passage construed to constitute recognition, but also another, cited from the same letter (with regard to piracy in the Persian Gulf), in which Great Britain conceded certain Persian rights in policing the Gulf. Lord Clarendon stated:

If the Persian Government are prepared to keep a sufficient force in the Gulf for these purposes, this country would be relieved of a troublesome and costly duty, but if the Shah is not prepared to undertake these duties, Her Majesty's Government cannot suppose His Majesty would wish that in those waters disorder and crimes should be encouraged by impunity.

If Persia had then been able to police the Gulf, the Iranian note concluded, then the British Government would have considered itself relieved from its "duty" and would have withdrawn, leaving Persia to carry out these duties. If the "duty" of policing the Persian Gulf had actually devolved upon Persia, in case Britain decided to withdraw from the Gulf, it does not follow, as the Iranian Government concluded, that the action would have constituted British recognition of Iran's sovereignty over Bahrayn. The Iranian Government failed to see that the right to police the Gulf (which was conceded by Britain) would not necessarily constitute recognition of its sovereignty over Bahrayn. Nevertheless, the Iranian Government contends that Britain had recognized Iran's sovereignty in the past and that there is no "justification of its refusal [now] to recognize Persian sovereignty over Bahrein."

It follows accordingly, from the Iranian standpoint, that the Shaykhs of Bahrayn have merely exceeded their power by entering "into direct relations with a foreign State without the express authorization of the central Government," and, therefore, their action lacks "juridical value in international law."

In his reply to this argument Sir Austen Chamberlain, Secretary of State for Foreign Affairs, sent two notes to the Iranian Government dated February 25, 1928, and February 18, 1929, in which not only the Iranian historical claim was questioned but the contention that the British Govern-

ment had recognized its sovereignty over Bahrayn was also challenged.¹⁴

Iran's claim that the British Government had ever recognized its sovereignty over Bahrayn was emphatically denied by Sir Austen Chamberlain. For ever since the year 1820, when Great Britain entered into treaty relations with the Shaykh of Bahrayn, it had acted on the assumption that the Shaykh was an independent ruler. When Captain Bruce, accordingly, negotiated the agreement of 1822 with the Governor of Shiraz, the agreement was promptly repudiated and Captain Bruce was recalled. "The main reason recorded for his recall," stated Sir Austen, "and for the prompt disavowal of this tentative agreement is that 'it acknowledges the King of Persia's title to Bahrein, of which there is not the least proof.' " Further, this agreement was also repudiated by the Shah of Persia who "expressed his displeasure that the Prince of Shiraz should have entered into any arrangements with the British Government without his knowledge or instructions." Since the Bruce agreement was repudiated by both Britain and Persia, it could hardly be cited as evidence of recognition by either party.¹⁵

With regard to Lord Clarendon's note of April 29, 1869, to which the Iranian Government attached greater importance, Sir Austen stated that the Iranian Government was "under a complete misunderstanding" in its interpretation of this note as meaning that "any recognition" of the Persian claims to sovereignty in Bahrein "was at that time intended."

The full text of the Clarendon note, however, was never published, which makes it indeed difficult to discover what Lord Clarendon's precise position was. But even if we analyze the meaning of the quotation apart from its context, it would seem that the British Government merely stated that the Iranian protest was duly considered.^{15a} Due consideration of the protest could hardly be regarded as an admission that the claim was legally valid. As Sir Austen Chamberlain rightly stated in his note of January 18, 1928:

. . . the whole tenor of the note should have made it clear that Her Majesty's Government maintained their right to enter into direct treaty relations with the Sheikhs of Bahrein as independent rulers; and while, at the same time, it indicated that Her Majesty's Government would gladly transfer to Persia, if she were able and willing to perform them, certain duties in the Persian Gulf towards the performance of

¹⁴ For the text of the Chamberlain notes, see League of Nations Official Journal, May, 1928, pp. 605-606; *ibid.*, May, 1929, pp. 790-793.

¹⁵ The Bruce agreement, it seems, had been cited by the Iranian Government in a number of former exchanges of letters, such as those of 1906 and 1907, but the British Government had invariably stated that the Bruce agreement under no circumstances implied recognition, since it was promptly repudiated by both parties. See League of Nations Official Journal, May, 1928, p. 607.

^{15a} This conclusion has been confirmed by an examination of the full text of the correspondence, which was made available to the writer by the British Foreign Office after this article went to press.

which the treaty relations in question contributed, and offered, in view of the friendly feelings entertained by Her Majesty's Government to be informed beforehand, when practicable, of any measure of coercion which the conduct of the Sheikhs might have rendered necessary, it is evident that no recognition of the validity of the Persian protest, or of the Persian claim to suzerainty, was thereby intended or implied.¹⁶

Probably greater emphasis is laid in the Iranian note on the general principles of international law which are invoked in its various sections. The general rule is stated at the beginning of the note as follows:

A territory belonging to a sovereign State cannot be lawfully detached so long as the right of ownership has not been transferred by this State to another State in virtue of an official act, in this case a treaty, or so long as its annexation by another State or its independence have not been officially recognized by the lawful owner of the territory.

Since the Iranian Government has never transferred or renounced its sovereignty over Bahrayn nor recognized its annexation by another state, it must therefore, according to the Iranian note, belong to Iran. International practice, however, could hardly support this rule, and its validity would actually permit any state to advance a claim to territory on the ground that its loss in the past had not been confirmed by an express approval of the owner. The effective establishment of the independence of a territory seems to supersede any previous connections. If the recognition of such independence was given by the Powers, even if the owner was not among them, the territory would be regarded as an independent sovereign state.

An Iranian writer, Mr. Malek Esmaili, in defending the claim of his country to sovereignty over Bahrayn,¹⁷ cited the *Clipperton Island* case,¹⁸ submitted by France and Mexico to the arbitration of the King of Italy in 1909, to prove his case. The following quotation from the arbitral award is given as pertinent:

There is no reason to suppose that France has subsequently lost her right by *derelictio*, since she never had the *animus* of abandoning the island, and the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitively perfected.

Mr. Esmaili's case is weakened by the fact that Clipperton Island was an uninhabited territory. Further, Mexico failed to prove any actual exercise of sovereignty over it after it was discovered by France in 1858. Thus it was decided that the island must belong to France, since in the uninhab-

¹⁶ *Ibid.*, p. 606.

¹⁷ M. Malek Esmaili, *Le golfe persique et les îles de Bahrein* (Paris, 1936), pp. 200-204.

¹⁸ See translation of the arbitral award in this JOURNAL, Vol. 26 (1932), pp. 390-394.

ited character of the island "occupation" need not necessarily be more than the mere announcement of an intention to take possession and the continuous assertion of title.

In an inhabited territory such as the Bahrayn Islands the mere assertion of title by Iran could hardly be regarded as sufficient, if she failed to establish in the territory an organization capable of making its laws respected. For this reason, accordingly, the Bahrayn case would be analogous to the *Palmas*, rather than the *Clipperton*, case, in which the principle of "continuous and peaceful display of the functions of State" was deemed necessary to determine the title to a territory. "Territorial sovereignty," stated the Permanent Court of Arbitration in the *Palmas* award,¹⁹ "involves the exclusive right to display the activities of a State" and that "without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfill this duty." The same principle was asserted in the *Eastern Greenland* case²⁰ in which the Permanent Court of International Justice endorsed, in 1933, the principle of "the peaceful and continuous display of State authority" which the Permanent Court of Arbitration applied in 1928 in the *Palmas Island* decision.

The Iranian claim, lacking any valid legal ground, seems to depend, in the last analysis, merely on Iran's historical connections with the islands which have often been reiterated in its notes to the British Government. How significant this historical claim may be and whether it could confer title to sovereignty calls for a brief consideration.

III. IRAN'S HISTORICAL CLAIM

The early history of Bahrayn is obscure, but the islands have been inhabited from a very early time on account of the pearl fisheries. They witnessed a number of conquerors from the time of the Babylonians in antiquity to the proclamation of British protection in the nineteenth century.

The Persians seem to have dominated the islands before the rise of Islam in the seventh century of the Christian era, but even before this time the Arabs had already migrated into the Persian Gulf coasts and settled in Bahrayn. The rise of Islam afforded a fresh opportunity for the Arabs to gain more permanent and complete control of the islands which lasted from the seventh to the opening of the sixteenth century.²¹ From Arab rule the islands passed into the hands of the Portuguese at the opening of the six-

¹⁹ Publication of the International Bureau of the Permanent Court of Arbitration (1928), reprinted in Scott, *Hague Court Reports* (second series), p. 84; also in this *JOURNAL*, Vol. 22 (1928), p. 867.

²⁰ Publications of the Permanent Court of International Justice, Series A/B, No. 53.

²¹ Tabari, *Tarikh al-Rusul wa al-Muluk* (ed. M. J. de Goeje, Leiden, 1879-1901), Series I, Vols. 1, 2, 3, 4, pp. 213, 745-747, 1630, 1952-1953.

teenth century.²² The Portuguese rule, which lasted about a century, came to an end as a result of their waning power in the Persian Gulf, when Portugal was annexed by Spain, and diverted the Portuguese forces from the East to be used in Europe. These favoring circumstances permitted the Persians to revive their interests in the Persian Gulf.

But Persian intervention in the affairs of Bahrayn, we are told by Arab historians, was prompted by internal conflict between the two rival Islamic sects.²³ For long the tribal chiefs of the two main Sunni and Shi'i sects of Bahrayn—a sectarian quarrel which wrought havoc in the Islamic countries—sought outside help against each other. Just as the Ottoman Empire had become the center of Sunni power, so Persia was looked upon by the Shi'i world as the defender of Shi'i rights.²⁴ During the reign of Shah Abbas (1587–1629), a great protagonist of the Shi'i cause, power in Bahrayn was then in the hands of a Sunni chief. The Shi'is appealed to Persia, and the Shah, assisted by the British, who were then pursuing the Portuguese, expelled the remaining Portuguese forces from Bahrayn and Hormuz in 1622.

From 1622 the Bahrayn Islands remained predominantly under Persian domination until 1783; but even during this period Persian rule was not an uninterrupted one, for the islands became the target of attack by neighboring rulers. In 1717 and 1720 the Arab chiefs of Muscat twice attacked the islands and wrested them from Persia; and it was not until 1737 that the islands were restored to Persian rule under the able command of Nadir Shah. Persian rule, however, remained unstable, for Nadir Shah's immediate successors became involved in a contest of supremacy over the islands with the chiefs of the Utubi tribes, who were then ruling the coast of Arabia across the bay from Bahrayn. The Utubis came originally from Najd and settled in Kuwayt, but later, with the help of the chiefs of al-Sabah tribe, rulers of Kuwayt, moved to al-Hasa and established themselves at Zubara, a town situated in the peninsula of Qatar opposite to the Bahrayn Islands.

In 1783 Shaykh Ahmad al-Khalifa, then chief of the Utubi tribes and ruler of Zubara, attacked Bahrayn and annexed it to his territory; but when Zubara was overrun by the Wahhabi forces a few years later, the Khalifa chiefs moved their seat of government to Bahrayn, abandoning their Arabian dominion.

While Bahrayn was freed from Persian rule, it never ceased to be the bone of contention among neighboring rulers, such as the Sultans of Muscat

²² Oestrup gives the date 1507 as the beginning of Portuguese rule (*The Encyclopedia of Islam*, Vol. I, p. 585) which seems to be the source of the date given in the Iranian note of Aug. 2, 1928 (*League of Nations Official Journal*, September, 1928, p. 1361).

²³ Al-Nabhani, *Tarikh al-Bahrayn* (Cairo, 1924); Amin Rihani, *Muluk al-Arab* (Beirut, 1929, 2nd ed.), Vol. II, Chs. 5–6.

²⁴ For a discussion of this schism in the Islamic society of the sixteenth century, see A. J. Toynbee, *A Study of History* (London, 1934), Vol. I, pp. 346–402.

and the Wahhabi Amirs. It was partly owing to this threat of neighboring rulers, but mainly to internal feud among members of the Khalifa family (chiefs of the Utubi tribes) that Great Britain found ample reasons for intervention.

In 1820, when Great Britain had already made her appearance on the scene in the Persian Gulf, the chiefs of Bahrayn sought British support for security from outside attack as well as for internal stability. This coincided with Britain's interests in the security of her trade relations and in the suppression of piracy and the slave trade in the Persian Gulf. It was in pursuance of this objective that Britain signed the first of a series of treaties with the Shaykhs of Bahrayn without encroaching upon their independence; but these treaties resulted later in the gradual change of the islands from independent to dependent status.

The foregoing brief sketch shows that Bahrayn, during its long and checkered history, was able to maintain a large measure of internal independence even when it had fallen under foreign control. Apart from its uncertain status in antiquity, which is hardly necessary to determine for our purpose, the islands passed under Arab rule at the opening of the seventh century and remained, either as an integral part of the Arab Empire or as a semi-independent entity, until the sixteenth century. Arab rule, accordingly, may be said to have lasted for more than eight centuries. The Portuguese rule roughly lasted for a century (*circa* 1507 to 1622), and the Persian rule (1622-1783) for a little over one and a half century. From a purely historical standpoint, the Persian period has left no special impact on the inhabitants of the islands, whether racial or cultural, which would distinguish it from other periods. Contrary to the Iranian contention (as stated in its note of August 2, 1928), the inhabitants of the islands have either originally migrated from Arabia or have been Arabicized under long Arab rule. They speak the Arabic language, though many of them speak Persian too, and their manners and customs are Arabian. Finally, they have been ruled since 1783 by their own Arab chiefs, even though they acknowledged British protection—a period which lasted longer than that of Persian rule. Iran's historical claim, based on a very limited past attachment, seems to carry with it the air of propaganda; it could hardly challenge Arab historical claims.

IV. BRITISH PROTECTION

From the time when Napoleon invaded Egypt in 1798 a period of Anglo-French rivalry for the domination of Eastern waters began, and the Persian Gulf was but one portion of the field in which the struggle was fought out. When Napoleon had been eliminated, the Eastern waters, including the Persian Gulf, became an undisputed field of British influence and commerce. Britain began to prepare the way by combatting piracy and the

slave trade, and she signed treaties with Persian Gulf chiefs by virtue of which, within a few years, she virtually became the paramount Power in the Gulf area. In a speech given to Persian Gulf chiefs on November 21, 1903,²⁵ Lord Curzon, in a state visit to this area, summed up the objectives of British policy and achievements during the nineteenth century as follows:

Sometimes I think that the record of the past is in danger of being forgotten, and there are persons who ask—Why should Great Britain continue to exercise these powers? The history of your States and of your families, and the present condition of the Gulf, are the answer. We were here before any other Power, in modern times, had shown its face in these waters. We found strife and we have created order. It was our commerce as well as your security that was threatened and called for protection. . . . We saved you from extinction at the hands of your neighbors. We opened these seas to the ships of all nations, and enabled their flags to fly in peace. We have not seized or held your territory. We have not destroyed your independence, but have preserved it. . . . The peace of these waters must still be maintained; your independence will continue to be upheld; and the influence of the British Government must remain supreme.

A General Treaty for the Pacification of the Persian Gulf, the first of a series which Britain negotiated with the Gulf chiefs, was signed on January 8, 1820.²⁶ The treaty provided that: "There shall be a cessation of plunder and piracy by land and sea on the part of the Arabs, who are parties to this contract, for ever" [Article 1]; and that:

If any individual of the people of the Arabs contracting shall attack any that pass by land or sea of any nation whatsoever, in the way of plunder and piracy and not of acknowledged war, he shall be accounted an enemy of all mankind and shall be held to have forfeited both life and goods. An acknowledged war is that which is proclaimed, avowed, and ordered by government against government; and the killing of men and taking of goods without proclamation, avowal, and the order of a government, is plunder and piracy [Article 2].

Article 4 required the Arab chiefs "not to fight with each other" and to maintain peace with the British Government; Article 9 prohibited slave trade and prevented the Arabs from carrying slaves in their vessels.

While this general treaty was jointly signed by the Arab Gulf chiefs, bilateral agreements were signed for its implementation in each of the chiefs' territories. With regard to Bahrayn, its agreement (February 15, 1820) provided:

That the Sheikhs shall not permit from henceforth, in Bahrein or its dependencies, the sale of any commodities which have been procured by means of plunder and piracy, nor allow their people to sell anything

²⁵ Cited by A. T. Wilson, *The Persian Gulf* (Oxford, 1928), p. 192.

²⁶ See text of the treaty in C. U. Aitchison, *A Collection of Treaties, Engagements and Sanads* (Delhi, 1933), Vol. XI, pp. 245-247.

of any kind whatsoever to such persons as may be engaged in the practice of plunder and piracy; and if any of their people shall act contrary hereto, it shall be equivalent to an act of piracy on the part of such individuals [Article 1].²⁷

Article 2 required the delivery of all Indian prisoners in Bahrayn and Article 3, the final article, states the adhesion of the Shaykh to the General Pacification Treaty.

It is to be noted that there is nothing in this agreement, nor in the General Pacification Treaty, which infringed on the powers or the independence of the Shaykh of Bahrayn. Britain readily recognized the Shaykh as an independent ruler. When, accordingly, the commander of the Egyptian forces had overrun the interior of Najd in the course of his wars with the Wahhabis, and announced his intention of taking Bahrayn as part of Najd, he was informed that the British Government could not admit any claim of Egypt to Bahrayn. The British Government, it will be recalled, declined to recognize similar claims advanced by Persia on various occasions during the nineteenth century. The Ottoman authorities made overtures to the Shaykh of Bahrayn with the object of obtaining his recognition of the supremacy of the Porte. "The ministers of the Sultan," said Aitchison, "were informed that, as the British Government had had treaty relations with Bahrain as an independent power, they could not acknowledge or acquiesce in any arrangement for placing the island under the sovereignty or protection of the Porte."²⁸

Rivalry among the members of the Khalifa family during the latter half of the nineteenth century was, perhaps, the principal reason which prompted Great Britain to sign further treaties with the Shaykhs of Bahrayn, with the consequential British encroachment on their independence, lest the Shaykhs should permit other Powers to control the islands. Jealousy among the chiefs, which prompted Britain to expel the ruler of Bahrayn in 1859, invited both Turkey and Persia to exploit this rivalry to their advantage. The Shaykhs began to play one Power off against another, and one of them, Shaykh Muhammad Khalifa, claimed the protection of both Turkey and Persia. The Persian flag was hoisted on the arrival of an agent of Persia, only to be pulled down and replaced by the Turkish flag on the arrival of the Turkish agent.

Great Britain made representations to both Turkey and Persia, which resulted in the disappearance of their agents, and the Shaykh's activities regarding his relations with his neighbors, as well as his powers regarding making war, piracy and the slave trade were restricted by the signing of a treaty in which a promise of British protection from foreign aggression was given. This treaty (signed on May 31, 1861), while it stated that the

²⁷ *Ibid.*, p. 233.

²⁸ Aitchison, *op. cit.*, Vol. XI, p. 191.

Shaykh was recognized as an "independent ruler," virtually reduced the islands to the status of a protectorate. The treaty ²⁹ stated:

I [the Shaykh] agree to abstain from all maritime aggressions of every description, from the prosecution of war, piracy, and slavery by sea, so long as I receive the support of the British Government in the maintenance of the security of my own possessions against similar aggressions directed against them by the chiefs and tribes of this Gulf [Article 2].

And it also provided that:

In order that the above engagements may be fulfilled I [the Shaykh] agree to make known all aggressions and depredations which may be designed, or have place at sea, against myself, territories, or subjects, as early as possible to the British Resident in the Persian Gulf, as the arbitrator in such cases, promising that no act of aggression or retaliation shall be committed at sea, by Bahrein or in the name of Bahrein, by myself or others under me, on other tribes, without his consent or that of the British Government, if it should be necessary to procure it. . . .

In 1867 Shaykh Muhammad was involved in a struggle with the Chief of Qatar, the peninsular coast of Arabia, and with one of the rival chiefs of his family, supported by the Persian Government. Britain, while it tried to restrain the Shaykh from his aggressive designs on Qatar, defended Bahrayn's independence against Persia.³⁰ Thereupon Shaykh Muhammad was deposed by Britain and his brother, Ali ibn Khalifa, signed an agreement in which he accepted to abstain from aggression and to appeal to the British Resident as arbitrator in any quarrel with his neighbors.³¹

During the latter part of the nineteenth century the Ottoman authorities in Arabia and Iraq made attempts to extend their influence to Bahrayn; but both Britain and the Shaykh of Bahrayn protested to the Ottoman Porte that Bahrayn was an independent country. In 1880 the ruler of Bahrayn, Shaykh Isa ibn Ali al-Khalifa, signed an agreement with Great Britain in which he agreed to abstain from entering into negotiations or making treaties with any foreign Power without her consent. The agreement, dated December 22, 1880,³² consisting of a single article, stated:

I, Isa Ibn Ali Al-Khalifeh, Chief of Bahrein, hereby bind myself and successors in the Government of Bahrein to the British Government to abstain from entering into negotiations or making treaties of any sort with any State or Government other than the British without the consent of the said British Government, and to refuse permission to any other Government than the British to establish diplomatic or consular

²⁹ *Ibid.*, pp. 234-236.

³⁰ Major General Sir Henry Rawlinson, *England and Russia in the East* (London, 1875), pp. 109-111; Aitchison, *op. cit.*, p. 192.

³¹ Text in Aitchison, *op. cit.*, pp. 236-237. ³² *Ibid.*, p. 237.

agencies or coaling depots in our territory, unless with the consent of the British Government. . . .

In 1892 this agreement was supplemented by another in which Shaykh Isa reluctantly accepted further limitations upon his powers. The text of the agreement of March 13, 1892,³³ is as follows:

1. That I [Shaykh Isa] will on no account enter into any agreement or correspondence with any Power other than the British Government.
2. That without the assent of the British Government, I will not consent to the residence within my territory of the agent of any other Government.
3. That I will on no account accede, sell, mortgage or otherwise give for occupation any part of my territory save to the British Government.

These two agreements seem to have placed the Bahrayn Islands under British protection by the Shaykh's acceptance of British advice in the conduct of foreign relations. When, in the following year, the Ottoman Porte claimed that the people of Bahrayn were regarded as Ottoman subjects within Ottoman territories and objected to British officials taking up the cases of Bahrayn subjects suffering from piracy, the British Government replied that Bahrayn was under "British protection."³⁴

In 1900 a British Political Agency, subordinate to the Political Resident in the Persian Gulf, was established in Bahrayn. In 1909 Shaykh Isa agreed not to allow the establishment in Bahrayn of post offices by any foreign government other than the British. In 1914 Shaykh Isa agreed that he would not himself, nor would he allow any foreign interest to, exploit the oil resources of Bahrayn without the approval of the British Government.³⁵

The foregoing treaty relations, often referred to as constituting "protection," have indeed touched upon matters beyond those normally covered in treaties between the protecting and the protected states. The Shaykhs of Bahrayn have not only given up some of their powers regarding the conduct of foreign relations—an action which is normal in international practice—but they have also alienated certain attributes of their internal sovereignty which would cast serious doubt as to whether Bahrayn is a *bona fide* protectorate. The status of Bahrayn, which constitutes a peculiar juridical position, is difficult to define in terms of modern international law; but this peculiarity raises the very issue whether Bahrayn's status, the legacy of various legal transactions made at a time when the Eastern World was outside the pale of international law, should be defined merely in terms of modern juridical rules.

V. THE JURIDICAL STATUS OF BAHRAYN

Under the general principles of Muslim law the Bahrayn Islands, as Muslim territory, are regarded as part of the *Dar al-Islam* (dominion of

³³ *Ibid.*, p. 238.

³⁴ *Ibid.*, p. 196.

³⁵ See text, *ibid.*, p. 239.

Islam) and its ruler must owe allegiance to the Caliph, the supreme politico-religious head of the Muslims.³⁶ The Caliph, who derives his authority from the sacred law, is charged with the functions of maintaining the integrity of *Dar al-Islam* and the propagation and defense of the religion.³⁷ It follows, accordingly, that so long as there was a Caliph in evidence, all the Muslims owed allegiance to him and acknowledged his ultimate authority. The Bahrayn Islands, until the time of the abolition of the Caliphate, must be regarded as part of the Caliph's dominions. Even the Persian occupation might be regarded as a continuation of Islamic sovereignty, for the Persian Shah, whether he acknowledged the Caliph's overlordship or ruled as a rival Caliph, claimed to fulfill the same functions enjoined by the sacred law over both his country and Bahrayn.

Long before the opening of the nineteenth century, when Great Britain made her appearance in the Persian Gulf, the authority of the Caliph had declined and certain portions of his dominions had passed under foreign rule. The occupation of Muslim territories by non-Muslim Powers was never recognized by the Caliph and was regarded as an anomaly under Muslim law. It was tolerated only so long as Muslim power was not strong enough to restore those territories to the rule of the sacred law.³⁸

The European Powers, on their part, when they came into contact with the Islamic world, were confronted with a civilization so different from their own that they found it more expedient to forget about their own system of international law in conducting their relations with Muslims and other Eastern people. It might have been possible to adjust the European system of international law to these lands by adopting certain rules and practices from Eastern laws. But in fact the distintegration of these Eastern societies had already gone too far to enable them to deal on a par with the European Powers.³⁹ In the circumstances, neither would Islam recognize Christian rule in its dominion, nor were the European Powers prepared at first to regard Eastern lands as falling under the pale of European international law. Thus the European jurists began to justify certain actions

³⁶ For a discussion on what constitutes an Islamic territory, see Abdur Rahim, *The Principles of Muhammadan Jurisprudence* (Madras, 1907), pp. 395-396; Majid Khadduri, *The Law of War and Peace in Islam* (London, 1941), pp. 19-20.

³⁷ See Sir Thomas Arnold, *The Caliphate* (Oxford, 1924), pp. 70-76; A. Sanhoury, *Le Califat* (Paris, 1926), pp. 3 ff.

³⁸ Even when the Ottoman Sultans ceded such territories as the Crimea (1774), Cyprus (1878), Egypt (1882), and Tripoli (1912), the "spiritual" authority of the Caliph was recognized by the Powers to continue over the Muslims who remained under foreign rule. See Arnold, *op. cit.*, pp. 163-183. This practice of the separation of the "spiritual" from the "secular" powers of the Caliph, which is not feasible in Muslim legal theory, was resorted to by the Ottoman Sultan in order to maintain sovereignty over lost Islamic territories. See C. A. Nallino, *Notes on the Nature of the Caliphate in General and on the Alleged Ottoman Caliphate* (Rome, 1919).

³⁹ See Majid Khadduri, "Islam and International Law," in *Islamic Literature* (January, 1951), Vol. III, pp. 19-21.

or violations of international law in the East, which would never have been tolerated in Europe, on the ground that Eastern lands were never recognized by European nations.⁴⁰

In the case of such dependent territories as Bahrayn and other Eastern protectorates, the jurists distinguished between a civilized protectorate of the type recognized by international law and an Eastern "protected state" by a European Power. In the former the protecting state assumes the duty of protecting the smaller or weaker state by undertaking the conduct of its external relations, but it is understood that the attributes of its internal sovereignty are left intact so long as the freedom of action of its government does not involve it with a foreign Power. In the case of Eastern "protected states" the protecting Power, in addition to its right to control foreign relations, is entitled, as stated by the Berlin Conference of 1884-1885, to the right of administering justice over subjects of other civilized states, and, by the General Act of the Brussels Conference of 1890, the right of organizing "the administration, judicial, religious and military services in the African territories placed under the sovereignty or protectorate of civilized nations."⁴¹

While the British practices with regard to the powers exercised in various Eastern protectorates differed radically, they were usually distinguished by two features. First, Britain maintained a certain measure of independence, which varied from that of Oman to that of the Protectorate of Aden. In the case of Oman, its Sultan has retained his internal sovereignty and has not given up any essential rights of external sovereignty, while in the case of Aden very few powers, if any, have been left to its people. Secondly, Britain does not intend to annex these territories to its empire, but rather has found it more expedient to maintain the ruling families or tribal chiefs to exercise control over their people than to assume full control of the internal administration. Britain's chief interest in extending her influence to such areas as the Persian Gulf, Zanzibar, or the Malay Islands, seems to be primarily to prevent other rival Powers from extending their influence and hence to threaten her commercial or strategic interests.

⁴⁰ "The conquest of Algeria by France," says Lorimer, "was not regarded as a violation of international law. It was an act of discipline which the bystander was entitled to exercise in the absence of the police; and the justification for the present interference of France in Tunis and our own in Egypt, must be sought in the extremely rudimentary character which still belongs to what is beginning to be called the European Concert." (James Lorimer, *Institutes of the Law of Nations* (Edinburgh, 1884), Vol. II, pp. 160-161.)

⁴¹ In the same convention it was also provided that the protecting states were entitled to establish stations, roads, railways, inland steam navigation, telegraph lines, and the maintenance of restrictions on the importations of firearms and ammunition. See W. E. Hall, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (Oxford, 1894), pp. 204-207.

Professor Robbins, in his discussion on the status of Aden, uses the very convenient term "colonial protectorates" which he applied to Aden and similar Asiatic protectorates. Such territories are administered as part of the British Empire and can hardly be distinguished from colonies. Professor Robbins goes on to argue that international law recognizes only real, not colonial, protectorates, and, as such, a colonial protectorate has no international status.⁴² While this term might answer the question with regard to the status of Aden Protectorate, it is doubtful whether it could define with any precision the status of Bahrayn. The Shaykh of this territory has often been referred to in his treaty relations with Britain as an independent ruler, and it is said that his country is under British protection; in the meantime his sovereign rights have been alienated beyond the conduct of foreign relations. The ruler of Bahrayn, as well as those of Oman and Kuwayt, have full control over the native administration, though they have been persuaded in the meantime to accept British advice.

It would seem that, under the foreign jurisdiction of the British Crown, the Eastern protectorates, while they are regarded as "protected states" from an international standpoint, are treated as under "tutelage" from the British constitutional standpoint. This Western concept of tutelage would satisfy Islamic law since it implies ultimate emancipation from foreign rule which is permitted under Islamic law only under *force majeure*.

It is to be noted that this concept seems to imply the principle of the Mandate System adopted by the League of Nations under Article 22 of its Covenant and of the new Trusteeship System, which is designed to replace the Mandate, under the Charter of the United Nations. Both systems are regarded as temporary, which fits the Muslim expectation of emancipation, when the territories are able to "stand alone." The period of tutelage, however, whether administered under the aegis of an international organization, or directly under Britain, is indefinite. Should this tutelage come to an end the Bahrayn Islands, under the new national life of the Islamic countries which has replaced the Caliphate, would then be free to choose whether they would join any union with the neighboring Arab countries, such as the Arab League, or remain independent. Turkey, as one of the successor states to the Ottoman Caliphate, cannot claim sovereignty over Bahrayn, should Britain decide to withdraw, since Turkey has given up all its sovereign rights over Arab lands under Article 16 of the Treaty of Lausanne of July 24, 1923.

⁴² Robert R. Robbins, "The Legal Status of Aden Colony and the Aden Protectorate," this JOURNAL, Vol. 33 (1939), pp. 714-715.

INTERNATIONAL LAW AND GLOBAL IDEOLOGICAL CONFLICT: REFLECTIONS ON THE UNIVERSALITY OF INTERNATIONAL LAW

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If, after the nineteenth century, there remained any question concerning the universality of international law, or of its fundamental rules, it appeared to be largely one of legal history. But as the world of the twentieth century has come to be divided by political ideologies, their legal ramifications have given the question new actuality as one of basic legal theory. That the Family of Nations, or the subjects of international law, embraced virtually all states of the world seemed no longer open to serious doubt when non-Christian states wholly outside Europe took part in the Hague Peace Conferences of 1899 and 1907 and when participation by such states was continued and further extended in the Paris Peace Conference of 1919 and in the League of Nations. Yet the same period that saw the unquestioned global expansion of international law has had to face new challenges to its unity as a single, universally valid legal system. They were raised chiefly by German Nazis and Soviet Communists, or in turn against them by their respective critics and opponents.¹ Confronted with these challenges, the universal validity of international law appears no longer as an existing phenomenon that may be traced back to its origins and on to its eventual completion, but as a debatable assumption that stands to be justified or rejected in the light of fresh examination.

THE QUESTION OF UNIVERSALITY REOPENED

The prevailing traditional view is succinctly stated in Lauterpacht's *Openheim*:

¹ See *e.g.*, against Communist doctrine: M. Chakste, "Soviet Concepts of the State, International Law and Sovereignty" (this JOURNAL, Vol. 43 (1949), p. 21): "If 'the great capitalist states reflecting the interests of the influential reactionary groups' are not expressly mentioned in this passage [by E. Korovin, quoted *infra*, note 8], that does not mean that Soviet legal theory can admit the existence of a code of international law that would be equally acceptable to these states and the Soviet state. The very substance of the Marxist and Leninist theory precludes such a possibility" (*Ibid.*, pp. 29-30); against Nazi doctrine: F. Neumann, *Behemoth* (1942), pp. 166-171; for arguments in Nazi writings against the compatibility of the Soviet system with international law: Beckhoff, *Völkerrecht gegen Bolschewismus* (1937).

International Law is based on the assumption that there exists an international community embracing all independent States and constituting a legally organised society. From this assumption there necessarily follows the acknowledgment of a body of rules of a fundamental character universally binding upon all the members of that society.²

or in Charles C. Hyde's lapidary phrase, "The international society or family of nations is as broad as civilization."³ Occasionally, the assumption that there are rules of international law necessarily universal is carried a step farther by maintaining that these rules are also necessarily perpetual, in the sense of an unbroken chain of legal validity. In this vein is the assertion of Josef L. Kunz that "general international law [here including, if not synonymous with, universal international law] is the only legal order in which there can be no revolution in the legal sense."⁴ Even where universality and perpetuity are not explicitly formulated as assumptions underlying international law, they are explained, or taken for granted, as the result of historical development, in the customary presentation of one Law of Nations evolving in the early modern age out of still earlier antecedents and now governing all its subjects in those of their relations for which it contains applicable rules.⁵

Against this may be set some of the more explicit statements from both Nazi German and Soviet Russian sources. In Germany, during the earlier years of the Nazi regime, support for the foreign policies of the Hitler Government was sought in various traditional doctrines of international law as well as in professedly racial ideas that were deemed peculiarly reserved to understanding or application by the German people. But while the former were preferred by previously established German legal authorities, the latter were put forward by writers who had risen to prominence with the Nazi Party and whose influence as spokesmen increased with the growing power of the regime. An early representative of this group, H. Richter, wrote in 1934:

Generally recognized international legal principles and international custom are recognized by Germany only then when they coincide with the legal concepts of the German *Volk*, and not because of their

² L. Oppenheim, *International Law* (6th ed. by H. Lauterpacht, 1947), Vol. 1, p. 48.

³ C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed., 1947), Vol. 1, p. 2.

⁴ J. L. Kunz, "Revolutionary Creation of Norms of International Law," this *JOURNAL*, Vol. 41 (1947), p. 119, at p. 122.

⁵ See, again, Lauterpacht's Oppenheim, *op. cit.*, Vol. 1, pp. 45-48; also, e.g., C. G. Fenwick, *International Law* (2nd ed., 1934), Ch. I; T. J. Lawrence, *The Principles of International Law* (1895), esp. pp. 4-5, 53-54; C. H. Stockton, *Outlines of International Law* (1914), Ch. III; and, with emphasis on the close relation of the law to social structure, G. Niemeyer, *Law Without Force* (1941), Chs. I-III. But see the observations by J. L. Brierly, *The Law of Nations* (4th ed., 1949), pp. 42-46.

international character, but because basic, ethical ideas of German law are at stake.⁶

In 1939, when the German Government had fully disclosed its expansionist policy of "living space" for the Greater German Reich, Werner Best could go as far as to write: "On the basis of the racial concept of law, the relations between states, hitherto called international law, cannot be called law."⁷

Soviet writers, on the other hand, have come to affirm the validity of international law for the Soviet state. But those who eventually retained official favor have stressed that the international law that the Soviet state can acknowledge as binding is not the same as the international law formulated by certain other states. As to just which are the states whose international law is incompatible with the law binding upon the Soviet Union, the doctrine permits convenient variations in terms distinguished more by vigor than by definiteness. Thus, Eugene A. Korovin, while pointing to the rôle which international law played in the second World War as "one of the forms for the realization of . . . collaboration" among the peoples of Europe and "as an ideological *place d'armes* for mobilizing forces against the enemy," concludes:

In the final analysis it must be admitted that there is not and cannot be such a code of international law as would be equally acceptable to the cannibal and his victim, to the aggressor and the lover of freedom, to the "master race" and its potential "slaves," to the champions of the sanctity of treaties and to those who would treat pacts as "scraps of paper," to the advocates of humanising and abolishing war and to the proponents of totalitarian war, to those who "value every tear of a child," to quote Dostoyevsky, and to those who try to build a third or any other empire on a foundation of women's corpses and children's skulls.⁸

In another version of the antagonism between Soviet and non-Soviet international law, it is said in Andrei Y. Vyshinsky's *The Law of the Soviet State*, speaking of the interest of "representatives of imperialism" in "veiling the serfdom of weak nations by the dominant classes of powerful nations":

The same interest is served also by various international non-state institutions (international tribunals and so on) organized on the basis of modern bourgeois international law.⁹

⁶ H. Richter, "Völkerrecht," *Deutsches Recht* (1934), p. 206, at p. 208, as transl. by V. Gott, "The National Socialist Theory of International Law," this JOURNAL, Vol. 32 (1938), p. 704, at p. 712.

⁷ W. Best, "Rechtsbegriff und Völkerrecht," *Deutsches Recht* (1939), p. 1345, at p. 1347, as transl. by Neumann, *op. cit.*, p. 170.

⁸ E. A. Korovin, "The Second World War and International Law," this JOURNAL, Vol. 40 (1946), p. 742, at pp. 742-743.

⁹ A. Y. Vyshinsky (ed.), *The Law of the Soviet State* (H. W. Babb, tr., 1948), p. 235. On the place of this book for study and reference in the Soviet Government, see J. N. Hazard's Introduction, *ibid.*, p. vi.

Such statements assume importance as challenges to the universal validity of international law from the conditions in which they were made. Diplomats or lawyers who are responsibly concerned with long-range interests of their countries and causes will ordinarily incline rather to caution or indefiniteness in expressing themselves on such a subject. They have to consider the uses of language for arousing support, for quieting down or confusing opposition, or simply for keeping open different routes for advance, retreat, or compromise. Nor can it be forgotten that no published views could depart far from officially approved lines of policy or propaganda in this vital field under regimes which have established effective totalitarian regimentation. The more outspoken statements which influential writers under these regimes have made, based as they have been upon the proclaimed ideologies of their governments, thus deserve especial attention.

They make it relevant today to re-examine the assumption of universality of international law, in the sense of its absolute or global universality. For one may affirm the existence of universal international law in a relative as well as in an absolute sense. Relatively universal international law would refer to such rules of international law as are valid for any state or comparable political community that happens to be a subject of international law; but this would not prejudice the question of which states or other entities are such subjects, whether all states and comparable entities everywhere on earth or only a definite group of them. Global, or absolutely universal, international law, on the other hand, presupposes that all states and comparable entities everywhere on earth are subjects of international law; it thus denotes the rules of international law that are assumed to be valid for all states and comparable entities on earth.¹⁰

¹⁰ It is in the latter sense that the existence of universal international law is affirmed in Lauterpacht's *Oppenheim, op. cit.*, Vol. 1, pp. 48-53, and in Hyde, *op. cit.*, Vol. 1, pp. 2-3. Sometimes universal in this sense of global international law is called "general international law," as by H. Kelsen, *General Theory of Law and State* (A. Wedberg tr., 1946), p. 326, or L. Gross, "International Law," in J. S. Roucek, G. B. de Huszar (eds.), *Introduction to Political Science* (1950), p. 622, at pp. 625-626. Similarly, what is here called relatively universal international law, as distinguished especially from particular treaty law, is often called "general," as in *Diversion of Water from the River Meuse*, Permanent Court of International Justice (Judgment, June 28, 1937), Separate Opinion by Judge van Eysinga, Ser. A/B, No. 70 at p. 53; or "generally accepted," as in *German Interests in Polish Upper Silesia*, P. C. I. J. (Judgment (Merits), May 25, 1926), Ser. A, No. 7 at pp. 22, 42; *The Chorzów Factory*, P. C. I. J. (Judgment (Jurisdiction), July 26, 1927), Ser. A, No. 9 at p. 27; *id.*, P. C. I. J. (Judgment (Interpretation), Dec. 16, 1927), Ser. A, No. 13 at p. 19; or "common," as in *Pajzs, Csáky and Esterházy Case*, P. C. I. J. (Judgment, Dec. 16, 1936), Separate Opinion by Judge Hudson, Ser. A/B, No. 68 at p. 80; *Electricity Company of Sofia and Bulgaria*, P. C. I. J. (Judgment (Preliminary Objection), April 4, 1939), Separate Opinion by Judge Anzilotti, Ser. A/B, No. 77 at p. 98; or "ordinary," as in *Pajzs, Csáky and Esterházy Case*,

Now the global validity or binding force of the international law under which we live may be asserted in two very different ways. It may be attempted to show that international law includes certain legal rules which are binding upon states and comparable entities everywhere of necessity. Such an approach is consistent with a naturalist and also with a purely logical view of international law. If international law is derived wholly or in part from the requirements of man's rational nature which is thought of as being always and everywhere the same, it follows that at least those of its provisions which flow directly from that universal source must be universally valid.¹¹ If international law is deemed a wholly positive law and all positive law is explained solely in terms of a distinct epistemological nature of its rules and the systematic connections between them, then international law can be viewed without contradiction only "as part of a universal legal order which encompasses also all the national legal orders."¹²

But if neither the natural law view nor the pure logical view of law is found acceptable,¹³ then it can only be asserted that universal validity is a conceivable and possible attribute of international law, rather than an essential and indispensable one. That is, international law may or may not at any given time include or rest upon legal rules binding upon states and comparable entities everywhere. This is the assumption with which the following discussion is concerned.

The universal validity of international law can be asserted from this standpoint only by inquiring what are the factors on which it depends whether or not international law contains universally valid or binding rules, and then showing that these factors are present in the international law of today. Since universality of international law goes to the territorial extent of the validity of certain of its rules, the two questions may be put more specifically as follows: First, What are the criteria or elements of the validity of law that may vary in their territorial extent, and that are therefore capable of universal extension? Second, Can these elements actually be found to be universal in the international law of the past or present?

Separate Opinion by Judge Hammarskjöld, *loc. cit.*, at p. 89; *Electricity Company of Sofia and Bulgaria*, Separate Opinion by Judge de Visser, *loc. cit.*, at p. 138.

¹¹ See the classical formulations of the rational basis of natural law in H. Grotius, *De Jure Belli ac Pacis* (1625), *Prolegomena*, secs. 6-10, 30; Bk. I, Ch. I, sec. 10; and S. Pufendorf, *De Jure Naturae et Gentium* (1673), Bk. II, Ch. III, esp. secs. 13-15, 23. Cf. J. Dabin, "General Theory of Law," in *The Legal Philosophies of Lask, Radbruch, and Dabin* (K. Wilk, tr., 1950), pp. 419-420, who, however, takes the universally and immutably valid natural law of the Schoolmen and the "Law of Nature and of Nations School" for a body of moral and "political" (*i.e.*, societal) rather than juridical rules, *ibid.*, at pp. 422-431.

¹² H. Kelsen, *General Theory of Law and State* (A. Wedberg, tr., 1946), p. 363.

¹³ The writer's criticism of basic conceptions of the pure theory of law has been formulated in "Law and the State as Pure Ideas," *Ethics*, Vol. 51 (1941), p. 158.

CRITERIA FOR THE TERRITORIAL AREA OF LEGAL VALIDITY

In determining the territorial area over which a system of law can be said to be valid, we do not have to postulate a complete theory of legal validity, which in turn can only be the core of a comprehensive and inevitably controversial theory of law. We have only to agree on the aspect of legal validity which will supply sufficient and indispensable criteria for its territorial area. For this purpose, it is enough to say that to be valid as law, norms or rules of conduct must be accepted as legally binding within the groups they are intended to govern. The extent of the territorial area of validity of any body of law will differ according to the expansion of the group within which it is accepted as binding.

By acceptance of rules as legally binding, nothing more is meant here than that they are accepted as obliging to the point that they may be justifiably applied by appropriate agencies which may be constituted for such application. The contemplated processes of application may include such functions as interpretation and construction of the rules, determination of supplementary or additional rules, finding of facts relevant to application of the rules, or argument concerning the rules or relevant facts in litigation or negotiation.¹⁴ Such application may extend to enforcement processes; or it may stop short of them and rely on ultimate compliance, or make non-compliance impracticable or exceptional or remote, or simply leave the question of complying in abeyance.

This aspect of validity is not the same as the efficacy of the law. There is a difference between acceptance of the law's application by constituted authority as the corollary of obligation, which is here considered as a criterion of validity, and the degree to which such application will actually occur, which denotes efficacy. Neither is the criterion of validity to be identified or confounded with any particular psychological function. Validity involves acceptance as an objective state or quality of the rules said to be valid; that is, it involves their quality of being accepted as binding. Validity is not concerned with acceptance in the sense of any accepting act or acts, mental or other, of individuals—acts that may produce or maintain or correspond to the state of acceptance. The term "acceptance" is of course one of those which may be employed to refer both to a process and to a state of affairs—much like terms such as "offer," "organization," "institution," or "government." But it is only in the sense of an objective state that acceptance matters for the validity of law. What is the true nature of the relationship between the objective state and any corresponding processes of acceptance, or what particular processes may be involved and on whose part, presents questions of a different order. As a criterion of legal validity, acceptance of a body of law does not require manifestations of any

¹⁴ The last is stressed by G. L. Field, "Law as an Objective Political Concept," 43 *American Political Science Review* (1949), 229.

particular strength—acquiescence, approval, support, initiative—or by any specific number of individuals within the group concerned—everybody, many, a majority, the most powerful—as long as the resulting state is clear. Again, acceptance need not embrace the content of each and every legal rule. For a particular rule to be legally valid it is necessary only that it belong, or be attributable, to a body of rules which as a whole possesses, or whose supreme rules possess, the quality of being accepted. That is, the attribution of that particular rule to an accepted, and therefore valid, body of law must in turn be accepted.

There is ample room, then, for speculation which has been concerned, within the context of a theory of knowledge of civilization and society, with the true nature of acceptance of the obligatory force of law as an objective aspect of legal validity, and its relationship to the causal processes of acceptance. Speculation of that sort need not preclude preliminary agreement on the significance of acceptance as an essential element of the validity of any law. Such agreement is indeed widespread and reaches across what in other respects are deep divisions of theory concerning the basis of obligation of law, and, in particular, of international law.

The element of acceptance may be found in the natural law conception of the basis of law in reason, which does, of course, prejudge in the affirmative the question of the universal extent of acceptance.¹⁵ It recurs, without any such prejudgment, in related modern conceptions of basic metajuridical requirements of human life or of human society for the validity of law.¹⁶ But it is present also in positivistic theories which base international law upon the consent of states, whether through their self-limitation or through agreements creating a merger of their wills or through custom implying tacit consent.¹⁷ It is present again in theories combining positivistic, rationalistic, and sociological elements in concepts such as the acquiescence of states which “can not well be withheld, and is, therefore, not likely to be withheld” in the face of general understanding of its necessity,¹⁸ or a compound of the assent of states and generally approved practice.¹⁹ In an oblique way it is admitted even in the pure logical conceptions of law which supplement positivism, where validity appears as reducibility to an hypothetical basic norm. For it is acknowledged that the usefulness of the ini-

¹⁵ Pufendorf, *op. cit.* (*supra*, note 11); *cf.* Grotius, *op. cit.*, *Prolegomena*, sec. 30.

¹⁶ G. Scelle, *Précis de Droit des Gens* (1932-34); J. L. Brierly, *The Law of Nations*, pp. 50-57; *The Outlook for International Law* (1944), pp. 4-5; also, apparently, P. C. Jessup, *A Modern Law of Nations* (1948), pp. 3, 7-8.

¹⁷ Represented, respectively, by G. Jellinek, *Die rechtliche Natur der Staatenverträge* (1880); H. Triepel, *Völkerrecht und Landesrecht* (1899); and Lauterpacht's *Oppenheim, op. cit.*, Vol. 1, at pp. 10, 16-19.

¹⁸ Hyde, *op. cit.*, Vol. 1, p. 5.

¹⁹ E. M. Borchard, “International Law,” *Encyclopedia of the Social Sciences* (1932), Vol. 8, p. 167.

tial hypothesis, on which the validity of a legal order is said to depend, in turn requires that that legal order as a whole should have a minimum efficacy, and that this means a minimum of general obedience and application.²⁰

The assumption of acceptance as an element of the validity of law seems to be irreconcilable only with certain positivistic views at one extreme and certain professedly realistic views at the other. It is opposed to that branch of positivism which follows Austin in founding the validity of all law upon supreme power of command and enforcement.²¹ By the same token, it differs from any view in which the decisive criterion of validity is enforcement, even though it be transferred from a positivistic to a "realistic" or functionalistic context and changed from enforcement actually willed into enforcement likely to be expected.²² It also leaves behind the view that law is essentially but a function or expression of psychological processes of judges or of lawyers or of laymen.²³ Likewise, it transcends the view that law expresses and aims to enforce but the notions of expediency held by dominant social classes.²⁴ To the Austinian, indeed, international law is inexplicable save as the accidental and expedient, and perhaps also morally sound, coincidence of several municipal laws on "external" or foreign matters; while in the eyes of the psychologistic or the class-conscious "realist" the distinct objective character of law, and therewith the validity of all law, disappears altogether.²⁵

Law may be accepted as binding, and may thus be valid, within groups of diverse size or territorial extent. When international law, or for that

²⁰ Kelsen, *op. cit.*, pp. xv, 29-42, 110-122; *Law and Peace in International Relations* (1942), pp. 14-16.

²¹ J. Austin, *Lectures on Jurisprudence* (3rd ed., 1863), esp. Lecture VI. That Austin's own conception, as distinct from that of some of his followers, is to be understood as a set of logical premises rather than an ethical or sociological foundation of the law is stressed in J. Stone, *The Province and Function of Law* (2nd printing, 1950), Ch. II, esp. at pp. 59-64.

²² H. J. Morgenthau, "Positivism, Functionalism, and International Law," this *JOURNAL*, Vol. 34 (1940), p. 260, at pp. 276-278.

²³ Cf. the controversy on American legal realism, *e.g.*, between R. Pound, "The Call for a Realistic Jurisprudence," 44 *Harvard Law Review* (1931), 697, and K. N. Llewellyn, "A Realistic Jurisprudence—The Next Step," 30 *Columbia Law Rev.* (1930), 431; "Some Realism about Realism," 44 *Harvard Law Rev.* (1931), 1222. And see K. N. Llewellyn, "On Reading and Using the New Jurisprudence," 40 *Columbia Law Rev.* (1941) 581; E. N. Garland, *Legal Realism and Justice* (1941); Stone, *op. cit.*, pp. 406-417.

²⁴ *E.g.*, Vyshinsky, *op. cit.*, pp. 5-38, 38-62. "In fact law is . . . a living reality, expressing the essence of social relationships between classes on the basis of the dominance, domination, repression, and subjection, by the dominant classes, of other classes who are subordinate to this dominance," *ibid.*, at p. 38. Cf. R. Schlesinger, *Soviet Legal Theory* (1945); H. Berman, "The Challenge of Soviet Law," 62 *Harvard Law Rev.* (1948-49) 220, 449.

²⁵ In the words of Stone, *op. cit.*, Ch. XXIV, secs. 3-7, their doctrines are "denials of the identity of law."

matter any other body or rule of law, is accepted within the widest possible group—by all mankind civilized enough to be capable of such acceptance—then it may be said to be universally valid, or a universal law. We are thus concerned with the factors on which the extent or area of acceptance depends.

We may look to the voluntary element in acceptance, its actual manifestations in the actions, rationalizations or professions of spokesmen for the groups concerned—in international law, the various states. If we are positivists, we may confine ourselves to a search for these manifestations. We may thus find out what the extent of the validity of international law happens to be in any given epoch. Indeed, it might be suggested that as far as the validity of law is concerned, the difference of the positivistic or the complementary pure logical views from the naturalistic or societal views may be reduced to a difference of emphasis upon either of the two aspects of acceptance, both coextensive with the area of validity; the according of acceptance, the voluntary element in validity, being stressed by the positivists, and the conditioning of acceptance, the necessity element in validity, by the non-positivists.

But in order to assert that the area of validity of international law is not just coextensive with manifestations of its acceptance but that it is truly dependent upon them alone, we should have to be more than positivists. We should have to imply that the manifestations are the acts of free and independent agents. We should thus have to take the standpoint of extreme indeterminism, at least with regard to those persons who are in a position to manifest acceptance or non-acceptance of a legal bond within their community or state. This would be tenable only if the manifestations of an acceptance bespeaking the validity of law are divorced in our minds from the whole context of physical and mental activities within which they occur. They may or may not then be grouped with other ethically relevant acts that are equally divorced in our minds from the context of the chains of causation. The result would be a more or less inclusive ethic of radical indeterminism. Such an ethic might be made consistent in itself, but it would fit poorly into any wider view of the law, or of other social value systems, that does not isolate the ethical from other aspects of the system.

Within a wider view of the law as a social value system, we have to look also to the conditioning elements of acceptance as factors on which the area of validity may be said to depend. We have to look, that is to say, to conditions that appear to be present where acceptance of the binding force of international law is manifested, and to be absent where no such acceptance can be found. There is room, again, for speculation about the true relation of these factors to the actual manifestations of acceptance—whether the former are to be understood as preconditions, as parallel or complementary phenomena, or whatever. For our purpose, it is enough to indicate what the principal factors of this kind are.

The first of these conditions is that there should exist among the individuals or groups concerned, which for purposes of international law means between states or their respective nationals, factual relationships of sufficient frequency, complexity, and importance to permit enough of them to be deemed regular and capable of regularization, and to make the absence of regularization appear at the least overwhelmingly or needlessly inconvenient. Travel and sojourn, trade, family relations, the transmission of cultural work, the threat or the actual employment of organized force for purposes of bringing about desired behavior, and the explanations, discussions, negotiations and decisions incident to all these, are such relationships that may cross the boundaries of states. To leave them to determination *ad hoc* in every instance, and to the resultant uncertainty in advance of each determination by authorities of one's own country and whatever other country may be concerned, involves a waste of effort in pursuing them that borders on the impracticable. To subject them to the unrelated regulatory action of one or more states proceeding separately may regularize such relations partially. But it may not sufficiently lessen the prohibitive waste of unpredictability where other states are capable of making some determinations and exercising some controls over them as well. Such situations will require common or interdependent and interrelated action by all the states concerned, and the assurance in turn of such action through a regulation governing it.

The second condition is that there should be available some standards to measure the degree of regularity or irregularity of the contemplated behavior. If behavior relationships are to be regularized so that they can be reasonably anticipated or relied upon or adjusted, there must be not only a measure of assurance that standards are adhered to, but also a measure of certainty as to what these standards are. In this sense, regularization involves regulation. As a regulatory device of social control, the law aims to define the regularity of anticipated conduct by setting standards by which to measure its regularity, or lawfulness; and it aims to assure the lawfulness of that conduct by setting standards for anticipated subsidiary action, designed to promote or enforce conformity to the primary standards. Standards involve value judgments, judgments of what ought to be in the particular instance in the light of what ought to be in other instances of various degrees of importance. For law to be accepted within any group some common understanding of values within that group is indispensable. There needs to be, not necessarily agreement about the character or importance of each particular value embodied in a value judgment, or about the legal standard for conduct which that value judgment provides. It is the task of the lawmaking process to work out and lay down such agreement, which goes to the contents of the law and not to its validity. But there needs to be, at any rate, mutual understanding as to what are the values involved; if not values actually agreed and decided upon, then values on

which there can be meaningful argument as to whether they have been or whether they should be adopted; or, as it were, a common language or common alphabet enabling us to talk of values, or at least perhaps languages or alphabets not so dissimilar that they become untranslatable and mutually unintelligible. In the case of international law, where the group within which it is accepted embraces all the states governed by it, it would be utopian to expect genuine and not merely verbal agreement on all values that may underlie or enter into each of its rules, more so even than in the case of the municipal law of a socially complex and heterogeneous great modern nation. But it is inescapable to assume mutual understanding or at any rate understandability of value considerations that may prevail in the states governed by international law with regard to their relations with other states.

THE EXPANSION OF THE AREA OF INTERNATIONAL LAW

Taken together, what has been said amounts to the assumption that the acceptance of legal obligation, which is involved in the validity of international law, depends upon a minimum of human relationships across national frontiers that admit of and call for international regulation, and upon a minimum of values that are understood or understandable across national frontiers and that may serve as standards for such regulation. On this assumption, the area of the dominion of international law extends as far as such regular relationships and commonly understood or understandable values extend. To test the assumption we may apply it to the historical expansion of the dominion of what has come to be known as international law. This is not to suggest that the area of international law was at every given moment coextensive with that of regular international relations and of common or communicable values. But it will serve to show that the binding force of international law has been finally, if at times slowly, recognized when the character and amount of relations made it pressing and agreement on standards made it possible to extend it.

It is arguable how far back the beginnings of international law can properly be traced. In the sense in which the question of its universality and perpetuity as a body of law could be meaningful, at any rate, it can be said to have begun only with the full emergence of the sovereign state of the modern era.²⁶ Sovereignty, however apt or problematical a legal con-

²⁶ International law in this sense is usually dated from the sixteenth and seventeenth centuries; see, e.g., J. L. Brierly, *The Law of Nations*, p. 1; Hyde, *op. cit.*, Vol. 1, pp. 1-2; Lauterpacht's Oppenheim, *op. cit.*, Vol. 1, p. 68. Sometimes it is traced back to a much earlier period, as to the medieval Renaissance in Italy, beginning with the twelfth century, by A. P. Sereni, *The Italian Conception of International Law* (1943), pp. 10-124, esp. at pp. 118-124. International law in the strict sense is specifically distinguished from the "law of nations" as a wider concept, embracing also legal rules observed between political communities prior to or outside of international law, by A. Nussbaum,

cept it may be,²⁷ is a sufficiently useful designation to set off the type of political community in which there is an authority, or a system of inter-related authorities, asserting and wielding legal power in behalf of the state which it conceives as a unit, within a defined territory in which it recognizes no legal power conflicting with, or independent of and unconnected with, its own. Taken in this sense, sovereignty distinguishes the modern state as an historical phenomenon from earlier forms of political organization, such as the congeries of feudal relationships, within and at the fringe of an Empire pretending to universality, and under a Church with a competing transcendent claim to universal authority, out of which it developed in Western Europe. It also distinguishes the modern state from political institutions that continued to exist outside of the expanding European state system until they were destroyed, subdued, or in form assimilated to it, and likewise from formally subordinate political units within this system. International law is pre-eminently the law governing relations between the states called sovereign, even though it has come to govern certain other relations as well.²⁸ It is the law that a state will consider binding upon itself in its relations with other states precisely in the absence of any other legal power superior to it, whether that be ecclesiastical, imperial, feudal, protective, or federal or other constitutional power; and it is the law that is

A Concise History of the Law of Nations (1947), pp. 1-2, and cf. pp. 23, 27-28, 53. But sometimes such a distinction is not clearly made in the history of international law doctrines, and emphasis is placed on the continuity that can be shown to exist between earlier and modern doctrines or institutions, rather than on the features which set off the international law of the modern age as a distinctive body of law or legal order, though one incorporating many earlier rules; e.g., J. Eppstein, *The Catholic Tradition of the Law of Nations* (1935); Baron M. de Taube, "*L'apport de Byzance au développement du droit international occidental*," *Académie de Droit international de La Haye, Recueil des Cours*, Vol. 67 (1939), p. 237.

²⁷ Among the latest contributions to this persistent controversy may be singled out, on the one hand, H. J. Morgenthau, *Politics Among Nations* (1948), pp. 243-263, and on the other, J. Maritain, "The Concept of Sovereignty," 44 *Am. Pol. Sci. Rev.* (1950) 343.

²⁸ Such as relations between non-sovereign states within a federal union, as in the United States in numerous cases before the Supreme Court; e.g., *New Jersey v. Delaware*, 291 U. S. 361 (1934), or in Germany, e.g., *Baden v. Württemberg*, 116 *Reichsgericht in Zivilsachen Anhang* 18 (*Staatsgerichtshof*, 1927), Annual Digest, Case No. 36 (1927-28), or Switzerland, e.g., *Thurgau v. St. Gallen* (*Bundesgericht*, 1928), Annual Digest, Case No. 289 (1927-28); or relations between a sovereign and an (internationally) non-sovereign state, as in the British Empire, upon a statement of a Secretary of State to the effect that the Crown treats the latter state as sovereign, *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149; *Duff Development Co. v. Kelantan Government*, [1924] A. C. 797 (H. L.); or relations of states with an international organization created by treaty, such as the United Nations, *Reparation for Injuries Suffered in the Service of the United Nations*, International Court of Justice (Advisory Opinion, April 11, 1949), I. C. J. Reports, 1949, p. 174; and see U. N. Charter, Art. 43; or with a person or authority recognized as having a special international status, as in the case of the Papacy during the period of the "Roman question" from 1870 to 1929, or conceivably with other individuals or persons, cf. Jessup, *op. cit.*, esp. pp. 8-10, 12-14, 15-26.

capable of binding a state as such precisely because the state possesses an authority fully and directly responsible for conduct within its territory.

This law came into being in a development of more than four hundred years, during which territorial political authorities in Western Europe succeeded in replacing the political links of feudalism and defying the universal pretensions of both the Holy Roman Empire and the Roman Catholic Church, and from which they emerged as the multiplicity of sovereign states within the area of Catholic and Protestant Christendom. To be sure, the rules and principles of that international law of the seventeenth century have their matrix in those which may be found to have applied in relations among the rulers or cities of Christendom in the preceding centuries. But during those centuries, claims of princes and municipalities to independence were maintained in continuing conflict with assertions of universal authority by popes and emperors, and the conflict was reflected in contemporary legal doctrines.²⁹ European politics and thought then contained still unresolved a variety of elements of different ultimate authorities, which came to appear contradictory and were resolved with the survival of only those compatible with the international law of sovereign states. This secular international law of the modern age cannot be identified with the law of the medieval Empire, or with the law governing certain relations among the political communities within or around the Empire, without determining whether particular legal rules or settlements of that earlier time should be ascribed to international or supra-national, to civil or ecclesiastic, universal or local sources of authority, and singling out such of the earlier rules as might be founded in retrospect upon truly international, secular, and yet universal Western Christian authority. To do so would project back into that period differentiations under a conception, which it was only in the process of forming, of a distinct and potentially exclusive source of legal authority of this kind. Even more strongly would the same thought apply to any legal rules that were observed in transactions between the Western Christian world and the Eastern Empire with its own claim to universal authority, or Moslem rulers governed by the law of the Koran.³⁰

At the time of its emergence as a body of rules binding upon states independently of any sanction by emperor or pope, international law thus extended in full force over an area that was united by continuing intercourse and by surviving traditions of the past unity of outlook from which sprang

²⁹ Cf. on the one hand, Sereni, *op. cit.*, esp. pp. 56-65, 118-124; and on the other, L. Gross, "The Peace of Westphalia 1648-1948," this JOURNAL, Vol. 42 (1948), p. 20, at pp. 30-34; Nussbaum, *op. cit.*, pp. 23-27, 28-37.

³⁰ On Byzantine and Moslem laws on foreign affairs and relations with the West, cf. M. de Taube, "*Etudes sur le développement historique du droit international dans l'Europe orientale*," *Académie de Droit international de La Haye, Recueil des Cours*, Vol. 11 (1926), p. 345, and *op. cit.* (*supra*, note 26); M. Khadduri, *The Law of War and Peace in Islam* (1940); Nussbaum, *op. cit.*, pp. 27-28, 37-38; Sereni, *op. cit.*, pp. 18-28, 53.

both the Protestant Reformation and the Catholic Counter-Reformation. The Peace of Westphalia and the disregard of the Papal Bull *Zelo Domus Dei* in 1648 marked, not indeed the creation of international law, but the end of the last claims of legal authority in conflict with it, and thus formalized the emergence of the system of states of Catholic and Protestant Europe under the sole dominion of international law.³¹ Subsequent expansions of the area of that dominion were formalized whenever outside states compelled respect equal to that accorded to the already established great Powers, or were admitted to important multipartite treaties, or obtained recognition as states with international legal personality.

Among the writers of the period, acknowledgment of this expansion was possible for those who based the validity of rules of international law wholly or in part upon the consent of states. The natural law writers had to assume the universality of international law *quâ* natural law, based on the ubiquity of man's reasonable nature, and to remain indifferent to any evidence of lacking insight anywhere into what they deemed to be the binding postulates of reason.³² But the Grotian view permitted an inner core of more advanced rules to be regarded as the law of Christendom;³³ and the radically positivistic consensualist view which became dominant in the nineteenth century required all international law to be considered as originally the law of European nations which was capable of spreading to states in other parts of the world.³⁴ Thus the extension of international law to Russia has sometimes been dated from 1721, to Turkey from 1856, to Japan from 1895, to China, Persia, and Siam from 1899 or definitely from 1919, and to other Asiatic and African states from their membership in the

³¹ Cf. Sir G. Butler and S. Maccoby, *The Development of International Law* (1928), Ch. I; Gross, *loc. cit.* (*supra*, note 29), at pp. 28-29; Nussbaum, *op. cit.*, pp. 86-87. *Contra*, in part, the conclusion in Sereni, *op. cit.*, pp. 118-124.

³² Pufendorf (*supra*, note 11).

³³ "The New Testament I use in order to explain—and this cannot be learned from any other source—what is permissible to Christians. This, however—contrary to the practice of most men—I have distinguished from the law of nature, considering it as certain that in that most holy law a greater degree of moral perfection is enjoined upon us than the law of nature, alone and by itself, would require." Grotius, *op. cit.* (Kelsey tr., 1925), *Prolegomena*, sec. 50. For Grotius' distinction between the law of nations and the law of nature, see *ibid.*, secs. 17, 40. See also R. H. Dana's Wheaton, *Elements of International Law* (8th ed., 1866), pp. 17-18.

³⁴ Suggested in the titles of the works of proclaimed positivists of the eighteenth century: J. J. Moser, *Versuch des neuesten europäischen Völkerrechts* (12 vols., 1777-80); and G. F. von Martens, *Précis du droit des gens moderne de l'Europe fondé sur les traités et l'usage* (1789); followed in the nineteenth century by J. L. Klüber, *Europäisches Völkerrecht* (1821); A. W. Heffter, *Das europäische Völkerrecht der Gegenwart* (1844; 8th ed. by Geffcken, 1888); P. Pradier-Fodéré, *Traité de droit international public européen et américain* (8 vols., 1885-1906); and others. Cf. W. E. Hall, *A Treatise on International Law* (4th ed., 1895), pp. 42-44; A. Hershey, *The Essentials of International Public Law* (1912), pp. 18-19, 96-97; G. G. Wilson, *Handbook of International Law* (2nd ed., 1927), pp. 25-26.



League of Nations or the United Nations or their diplomatic recognition by great Powers.³⁵ Actually, the statements of writers lagged behind legal relations established by those states with the older subjects of international law through treaties, diplomatic negotiations, or acts of municipal law referring to rules or institutions of international law.³⁶ Those statements can be accepted only as expressions of uncertainty whether all or only some of the rules of international law extended to the new members of the community of nations at a particular time. In each of these cases participation of the new members in international law may be said to have been admitted gradually from the first treaties or acts that considered international law applicable. No doubt was entertained about the extension of international law to new states arising, and recognized as such, in areas previously governed by subjects of international law, of which the United States was the first outside of Europe.³⁷

Looking back at the entire period, it is possible to say that, despite conflicting conclusions which writers at various stages of the development

³⁵ See e.g., L. Oppenheim, *op. cit.* (1st ed., 1905), Vol. 1, pp. 32-34, 62, 68, 71, and Lauterpacht's Oppenheim, *op. cit.* (6th ed., 1947), Vol. 1, pp. 45-47; C. Eagleton, *International Government* (rev. ed., 1948), p. 66. Cf. Hershey, *op. cit.*, pp. 97-98; Hyde, *op. cit.*, Vol. 1, pp. 127-129; J. Westlake, *International Law* (2nd ed., 1910), Vol. 1, p. 40; Wilson, *op. cit.*, pp. 18-19.

³⁶ Russia was a party to peace treaties with other European Powers in the seventeenth century; cf. Oppenheim, *op. cit.* (1st ed., 1905), Vol. I, p. 62; Butler and Maccoby, *op. cit.*, pp. 101-102. Turkey, whose political relations and agreements with sovereign European Powers date back to the Capitulations with France in 1535, was a party to separate peace and truce treaties with individual European Powers at Carlowitz in 1698 and to a number of treaties prior to 1856 referring to application of rules of international law between itself and the contracting European Power; cf. Butler and Maccoby, *ibid.*; H. A. Smith, *Great Britain and the Law of Nations* (1932), Vol. I, pp. 16-18; H. McK. Wood, "The Treaty of Paris and Turkey's Status in International Law," this JOURNAL, Vol. 37 (1943), p. 262, concluding that Turkey's participation in international law antedates 1856; and, on the other hand, *The S. S. Lotus*, P. C. I. J. (Judgment, Sept. 7, 1927), Dissenting Opinion by Judge Weiss, Ser. A, No. 10 at p. 40, considering Turkey as subject solely to international law only since the Peace Treaty of Lausanne of 1923. Illustrative of earlier treaty relations with European Powers, or legislation referring to international law, on the part of other countries of non-European civilization are the following: Chinese-British Treaty, Aug. 29, 1842, 30 British and Foreign State Papers 398; Chinese-U. S. Treaty, July 3, 1844, 4 Miller 559; Chinese-French Treaty, Oct. 24, 1844, 34 B. & F. S. P. 1298; also Japanese-U. S. Treaty, July 29, 1858, 1 Malloy 1000, 48 B. & F. S. P. 596; Japanese-Russian Treaty, Oct. 12/24, 1857, 57 B. & F. S. P. 1057; Japanese Proclamation of Neutrality, Aug. 29, 1870, Déak and Jessup, *Collection of Neutrality Laws*, Vol. I, p. 736; also Persian-Russian Treaty, Feb. 10/22, 1828, 45 B. & F. S. P. 865; Siamese-British Treaty, June 20, 1826, 23 B. & F. S. P. 1153; note of Siamese Minister for Foreign Affairs to American Minister at Bangkok, April 30, 1898, Déak and Jessup, *op. cit.*, Vol. 2, p. 920. Cf. also U. S. treaties with Morocco, June 28, 1786, 2 Miller 185; Algiers, Sept. 5, 1795, *ibid.*, p. 275; Tripoli, Nov. 4, 1796, *ibid.*, p. 349; Tunis, Aug. 28, 1797, *ibid.*, p. 386.

³⁷ Cf. A. Hamilton, *Letters of Camillus*, No. 20, quoted in J. B. Moore, *Digest of International Law* (1906), Vol. 1, pp. 10-11.

reached about the limited or universal dominion of international law, the area of its application has consistently widened. This has occurred at a progressive rate in the later nineteenth and the twentieth centuries, while international contacts grew in number and intensity and while the standards of lawful international conduct of states underwent a significant corresponding change. Standards or values that were supposed to be basic to the system as a whole became secularized and diluted, from those assumed to inhere in Christianity and Western civilization, to ability and willingness to observe obligations of international law itself under whatever traditions, motivations and aspirations.³⁸ At the same time, as the fields and forms of activities governed by international law became more and more numerous and technical, specifically defined standards came to be set for particular conduct without having to resort for their formulation to underlying value principles.

THE SURVIVAL OF UNIVERSAL INTERNATIONAL LAW

We are thus led to ask whether regular relations and shared standards pertinent to the observance of international law, which appear to have been the conditions historically present over the area governed by international law, still prevail throughout the world in the contemporary state system. That a substantial measure of factual relationships involving governments has now spread over virtually the entire globe is beyond argument. The last areas that were still apart from regular intercourse with the general state system have now in one way or another entered that system. Some have seen their own governments finally enter it through formal recognition, diplomatic relations, or membership in international organizations. Some have fallen under the jurisdiction or protection of a state already a member of the system.³⁹ Few, if any, permanently inhabited areas of the earth are not now under the jurisdiction of states members of the system or of international agencies acting for them.

It is more difficult to say that this world-wide area of international intercourse is also one of at least some shared standards. Seemingly contradictory elements exist together in the contemporary scene. On the one hand stands the record of the very treaties and other diplomatic acts which attest to the existence of factual international relations. These acts are normative

³⁸ League of Nations Covenant, Preamble and Art. 1, par. 2 ("its sincere intention to observe its international obligations"); U. N. Charter, Preamble, Arts. 1 and 2, Art. 4, par. 1 ("accept the obligations contained in the present Charter and . . . are able and willing to carry out these obligations"), Art. 6 ("violated the Principles contained in the present Charter").

³⁹ For a recent summary of the increase in the number of states during the first half of this century, see H. W. Briggs, "Community Interest in the Emergence of New States: The Problem of Recognition," *Proceedings, American Society of International Law*, 1950, p. 169, at pp. 170-171.

in content. They purport to prescribe conduct in the light of the norms or standards that are used to define it. Recognition of a state, whatever its theoretical character may be thought to be, involves admittance of the recognized state into relationships with the recognizing state under the rules of the existing body of international law. Conclusion of or adherence to a treaty involves the assumption that all parties are bound by its terms in the same sense—whatever the differences of the sense that may be ascribed to these terms by diverging national interpretations. In any such interpretation it is assumed that the meaning which is asserted is the one binding upon the parties as the true sense of the treaty, and not binding only upon the interpreter's own country or only upon its opponent. There may be argument; but argument itself is possible only within a frame of mutual understanding of terms in which the argument may proceed.

But on the other hand are the conflicting beliefs as to what are the terms of reference for argument and possible settlement, or, in other words, the underlying standards of the law, as they are asserted by writers of varying degrees of authority or in the pronouncements of governments. There was the long tradition of stating national claims or views in common or commensurable terms, no matter how wide the gap between the claims or views. Differences of theoretical explanation would not necessarily be national differences. Positivists or naturalists, monists or dualists, proponents of the primacy of international or of national law, could all be found in many countries. Governmental practice did not normally rely on any professedly national theory for the justification of claims, nor did national courts for the decision of questions of international law. But since the first World War some governments or their apologists have come to justify their national policies in terms of new ideologies, and these ideologies include claims of a fresh foundation of international law, or indeed of all law, which were conceived as peculiar to some nation or form of national society or government as opposed to others. It is as statements of such pretended new standards incompatible with the standards hitherto supposed to be established by the rules of international law, or in their extreme form pretended standards of international relations which do not even admit of the conception of law, that the challenges to the universality of international law become relevant, which we noted at the outset.

The vagaries of Soviet Communist doctrine on standards governing international law—epitomized in the changes of ascendancy from Korovin to Pashukanis on to Korovin again—are successive variations of a consistent theme.⁴⁰ All law must be explained as an instrument of policy, which is

⁴⁰ E. A. Korovin, *Das Völkerrecht der Uebergangszeit* (German tr., 1929, from the 2nd Russian ed. of 1925); E. B. Paschukanis, *Allgemeine Rechtslehre und Marxismus* (German tr., 1929); Korovin, "The Second World War and International Law," cited *supra*, note 8. Cf. T. A. Taracouzio, *The Soviet Union and International Law* (1935), pp. 10-11, 12; J. N. Hazard, "Cleansing Soviet International Law of Anti-Marxist Theories,"

necessarily the policy of the ruling class of a state, and the antagonism of the classes which rule the Soviet state and the capitalist states must be reflected in correspondingly antagonistic systems of law. The international law acknowledged by the Soviet Union thus cannot by definition ever be wholly the same as that formulated by capitalist states. How much the two differ will depend on how far the field of this antagonism in policy extends and how sharp the antagonism is at any given time. The successive variations of doctrine are attempts to explain the existence of some international law, its nature and extent, in terms of a theory that can be reconciled both with the professed methodological dogmas of Marxism and with the exigencies of the current foreign policies of the Soviet Union, and that is as consistent and plausible as these requirements permit. The writers now most authoritative are particularly emphatic in denying and deriding the very possibility of values that could be common to proletarian and capitalist states, let alone to proletarian and Fascist ones.⁴¹ Yet, at the same time they admit that there are interests of a humanitarian or of a practical economic and political character which may coincide under the policies of Communist and non-Communist states.⁴² They admit, that is to

this JOURNAL, Vol. 32 (1938), p. 244, and "The Soviet Union and International Law," 43 Illinois Law Rev. (1948) 591; J. Florin and J. H. Herz, "Bolshevist and National-Socialist Doctrines of International Law," Social Research, Vol. 7 (1940), p. 1. Cf. also R. Schlesinger, Soviet Legal Theory (1945), pp. 275-290; Nussbaum, *op. cit.*, pp. 287-292; and literature cited *ibid.*, pp. 344-345, and in Lauterpacht's Oppenheim, *op. cit.*, Vol. 1, p. 52, note 1.

⁴¹ See the statements by Korovin and Vyshinsky, quoted *supra*, p. 650.

⁴² E.g., I. P. Trainin, "Questions of Guerrilla Warfare in the Law of War," this JOURNAL, Vol. 40 (1946), p. 534, at p. 535, observes: "Even a great and powerful state cannot appear in the international arena without taking into consideration some of the rules (on questions relating to railroads, the telegraph, navigation, struggles against epidemics, etc.) which are called forth by the logic of developing economic relationships." Korovin in his earlier work acknowledged the possibility of some common values as well as material interests, *Das Völkerrecht der Uebergangszeit*, pp. 12-14: "The community based on intellectual unity (solidarity of ideas) disappears as a rule between countries of bourgeois and socialist civilizations, and the complex of legal norms corresponding to it becomes obsolete. Yet this does not exclude the possibility of partial legal intercourse based on the acknowledgment of the values of a universally human order, i.e., those values which are not bound to a limited epoch and sharply defined order of political and social forms, e.g., the struggle against epidemics, protection of archaeological, artistic and other monuments, etc." As regards "the question of the international community in the sphere of material interests in the strict sense of the word (economic needs, commercial intercourse, etc.)," he distinguished "1. international legal relations of a technical type, and 2. those concerning the definition of material interests with a social content. Included in the first category must be all sorts of treaties and acts regarding postal and telegraphic communications, railroads and navigation, monetary units, the metric system of weights and measures, etc. To the second group belong commercial treaties, international agreements for the protection of industrial property, concerning the conflict of laws, etc." Pre-socialist agreements of the first, but not of the second group, under socialism "not only retain their full value but acquire a new, deeper significance."

say, that under those different policies governments and societies in both regimes may have the same ideas as to what are the concrete immediate aims at which desirable conduct is to be directed, or what specific conduct ought to be; in other words, what are the standards by which such conduct is to be defined. This is sufficient to render regulation by a law common to these different states both possible and necessary.

Nor is the picture essentially different, in this respect, as we look back to Nazi German sources. There was a greater diversity in the thoughts of leading theorists and a more gradual and groping break with traditional doctrines of the foundations of international law. Some respected writers continued to express a variety of doctrines long familiar in German international law teaching, from theories of the self-limitation of states to those of consent of states or of a community of states, or even natural law propositions on the contents or trends of international law, not inconsistent with current Nazi policies.⁴³ Those writers, however, who did put forth peculiarly Nazi theories of international law, so designed the assumptions on which international law, like all law, was in their view to be founded that these assumptions could not be shared by non-Germans. This was true, whether or not their assumptions were capable of, or were even intended for, rational defense, and whether they were epitomized in the phrase that "right is what benefits the German people, wrong is what harms them," or were elaborated in the verbiage of racial or spatial or pseudo-social German imperialism.⁴⁴ But there also was stress upon the coinciding of interests of Germany and other nations, even though the nations to whom the appeal

(Writer's tr.). More recently, in the article cited (*supra*, note 8), at p. 743, Korovin defines international law in the coming period of history, more sweepingly and with interesting ambiguity, as "legal norms guaranteeing international protection of the democratic minimum." At the end of the development of international law through the whole transitional period, of which "the coming period" appears to be a phase, he expected the sole survival of "intersoviet law" as a universal law. *Das Völkerrecht der Uebergangszeit*, p. 142.

⁴³ H. Kraus, "Das zwischenstaatliche Weltbild des Nationalsozialismus," 62 *Juristische Wochenschrift* (1933) 2418; G. A. Walz, "Das Verhältnis von Völkerrecht und staatlichem Recht nach nationalsozialistischer Rechtsauffassung," 18 *Zeitschrift für Völkerrecht* (1934) 145; V. Bruns, *Völkerrecht und Politik* (1934); E. Wolgast, *Völkerrecht* (1934). On the connections between the assumptions of these authors and pre-Nazi German writings, see L. Preuss, "National Socialist Conceptions of International Law," 29 *Am. Pol. Sci. Rev.* (1935) 594, at 597-605.

⁴⁴ H. Nicolai, *Die rassengesetzliche Rechtslehre* (1932); N. Gürke, *Volk und Völkerrecht* (1935), and *Grundzüge des Völkerrechts* (1936); W. Best, "Rechtsbegriff und Völkerrecht" (*supra*, note 7); O. Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte* (1939). Cf., on the successive phases of Nazi doctrines and pronouncements on international law, Preuss, *op. cit.* (*supra*, note 43); Gott, *op. cit.* (*supra*, note 6); Florin and Herz, *op. cit.* (*supra*, note 40); F. Neumann, Behemoth (1942), pp. 150-171; Nussbaum, *op. cit.*, pp. 278-280. On the virtual absence of similar doctrines under Italian Fascism, see Sereni, *op. cit.*, pp. 269-278.

was made, or the grounds on which it was made, would vary as opportunity suggested. It could not be otherwise if international law was to continue to serve, as it did serve even the Nazi Government, as an instrument of foreign policy. Even if international law is used only for the purpose of creating a false sense of security in intended victims, it must be acknowledged while being so used. As the criminal relies on domestic law to reap the very fruits of his crime, so does the government that intends to break international law when expedient rely on international law to create the very conditions for the expediency of its breach. For common standards to exist, what matters is that professions of such standards are made and are relied upon, and not how sincerely they are made.

Neither can it matter whether standards actually common or identical are in theory or nomenclature conceived as values, as interests, or by any other term, nor what the grounds or reasons of their community or identity are. To assume that common standards should not only be common in content—what certain conduct should be like, or by what it should be measured—but should be derived also from common views regarding the nature of the grounds on which they can be justified—why certain conduct should be measured by certain standards—is to assume that the validity of law depends upon agreement about the theory of its validity.

Again, it cannot matter for the validity of a common body of law how many or how fundamental, in the eyes of those who are bound by it, are the standards that actually are commonly shared. To require comprehensive agreement, or agreement on fundamentals, is to give law a higher value than it can bear in any society not extremely homogeneous and united in its beliefs. Such homogeneity may exist spontaneously in small primitive societies, and it might conceivably be brought about by complete regimentation of even a complex national society under modern technological conditions. Contemporary developments raise doubts whether even the ruthless controls of the most absolute mass party autocracies of the twentieth century are efficient enough to produce the reality and not merely the façade of such “monolithic” unity of belief, as distinct from practically sufficient uniformity of obedience and submission. Short of such controls, national societies live under law without achieving comprehensive or fundamental unity of belief in values, or even agreement as to what values are the fundamental ones. Secular and religious, libertarian and authoritarian, rationalistic or irrationalistic convictions are being held within varying degrees of conviction or indifference by people who form one nation governed by the same law, and they may indeed be argued and fought over in making and construing that law. There is no reason to consider wider or more basic agreement internationally the prerequisite of international law. To expect it of global law, international or supra-national, is utopian.

PROSPECTS FOR THE SCOPE OF UNIVERSAL INTERNATIONAL LAW

Yet the deep division between the major states which the political evolution of the contemporary state system has produced does have profound effects upon the scope of universal international law. It has not destroyed all common standards on which different states can and do agree. But on some standards of international conduct it has brought forth emphatic disagreement between the doctrines espoused by the governments of the most powerful states. Among these are precisely such standards as appear to either side or to both as among the most fundamental. They are involved in the meaning to be given to the broad conceptions referred to as basic in the construction of international law, as in the United Nations Charter conceptions of peace and security, equal rights and self-determination of peoples, human rights and fundamental freedoms, sovereign equality and political independence of states.⁴⁵

This division on fundamental standards does not preclude the universal validity of a body of international law—of some, at any rate, of the rules of international law. It does, while it lasts, set limits to the field governed by universal international law. The processes of diplomacy continue, but fewer opportunities remain for agreements to be reached by diplomacy. Texts of agreements once concluded remain on the books, but they stay without effect as the agreements are revealed as verbal rather than substantial. International organizations expand in number, in membership, and in jurisdiction, but their activities are not in fact extended to important matters within their jurisdiction. While this state of affairs persists in the relations between some of the most important Powers, it obstructs the development of new rules even of fairly general, let alone universal, application.

At the same time, the division on fundamentals encourages trends away from universal law. It promotes the further growth of non-universal, or particular, international law among those states which are bound by a community of special interests reflected in common standards that reach beyond the universally accepted minimum and are held to express more fundamental values. The creation of new particular international law among such states is given the impetus of practical necessity or urgency, as more nearly universal agreement is found impracticable on matters calling for solution. And it is stimulated by rational and emotional plausibility, as values deeply cherished may be invoked which universal law fails to embody or promote.

There is nothing new in the existence of rules of particular international law, sometimes valid over so wide an area that they have been called "general" as distinguished from truly universal international law. They have developed within the frame of universal international law and been recognized as compatible with it. They have added to the rights and obligations

⁴⁵ Charter, Art. 1, pars. 1, 2, 3; Art. 2, pars. 1, 3, 4.

of universal law or otherwise modified them as between the states parties to them. But they have not changed the international law in force between any member of the group of states bound by the particular rule and any state not so bound. Such has been the prevailing view, developed with regard to the effects of treaty provisions upon states not parties to the treaty, and maintained in principle for the effects upon non-Member States of provisions in the Covenant of the League of Nations and the Charter of the United Nations.⁴⁶

In the contemporary state of division on fundamentals, the growth of bodies of rules of particular international law over wide areas, each with common interests and values which hold it together and separate it from areas outside, is both challenging and disturbing. Once it is recognized that even those rules of international law which would appear fundamental in logic or in value are neither necessarily universal to all governed society nor necessarily particular to any one system of governance, there is the hope that where higher standards or broader fields of regulation by international law cannot be attained at a universal scale, they may at least be reached for as many countries as find agreement upon them possible and compelling. But with the unity that may come from such attainment, there is also the threat that still less store may come to be set by the results of universal agreement at lower levels of value or interest; and it may appear progressively less worth while to maintain such universal agreement as compared to the fuller development in a more limited area of higher values and more pressing interests.

What remains of universal international law may thus come to shrink in content, not only proportionately to the growth of particular international law, but even absolutely, as interest is given up in the survival of much of its content and understanding of its standards is correspondingly lost. Universal agreement would no longer survive on matters that used to be governed by universal international law. Carried to its extreme, such a development could break up the universal system of international law, as it has come down to us, into regional or other partial systems, with no international legal rules to govern the actions of states across the frontiers of the various systems.⁴⁷ In relation to the states outside of each system, the

⁴⁶ Covenant, Art. 17; Charter, Art. 2, par. 6. See, for the prevailing view, F. Roxburgh, *International Conventions and Third States* (1917); Hyde, *op. cit.*, Vol. 2, pp. 1466-1467; Lauterpacht's Oppenheim, *op. cit.*, Vol. 1, pp. 831-834. But see *ibid.*, at p. 834: "It cannot be admitted that the International Court of Justice or any other organ of the United Nations established under the Charter would be at liberty to hold that action taken in pursuance of Article 2 is contrary to International Law," and note 3; H. Kelsen, *The Law of the United Nations* (1950), pp. 106-110; and cf. Jessup, *op. cit.*, pp. 132-136.

⁴⁷ Such a pluralism of partial systems of international law would be divisive beyond the pluralism envisaged by Korovin, *Das Völkerrecht der Uebergangszeit*, pp. 7-8. While he denies the existence of a universal international law, the particular legal systems

international law prevailing within the system would at best be reduced to a position comparable to the Roman *jus fetiale*, an internal law dealing with foreign relations. If our view of the essential elements of the validity of international law is correct, this would involve something near a disappearance both of the interests bound up with the maintenance of regular relations between the systems, and of the standards implicit in their regulation—a state, if not of virtual isolation, then of extreme hostility, of a revolutionary war in which even legal rules of warfare would have ceased to exist.

which he assumes are overlapping rather than separate: an international law of European major Powers, of American states, between major and secondary states, between capitalist and colonial or semi-colonial countries, and between socialist and bourgeois states. The same state may thus be bound by rules of one or the other system depending upon what other state is involved with it in a particular international legal relationship.

INTERNATIONAL ARMED FORCES AND THE RULES OF WAR

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There is general international acceptance at the present time of many limitations placed on the conduct of the forces of states engaged in armed conflict. It is generally agreed, for example, that prisoners of war must be treated humanely; that wounded, sick and shipwrecked members of armed forces must receive special attention; and that the position of noncombatants and persons in occupied territory must be safeguarded.¹ Limitations on the use of gases and submarines, among others, have been widely accepted.² The rules are recognized as binding even in the event of an illegal war³ and are accepted, at least to some extent, even by nations and groups not parties to the treaties and conventions which have sought to set forth general limitations.⁴

Granting the existence of generally recognized rules of war, the question remains whether international forces are bound to observe them. It would appear that the solution of this problem is found largely in other than legal considerations.⁵ There are two major questions: A, Is an international action one to which the pre-existing rules of war apply at all? B, What is the nature of the obligation, if any, applying to such an international action?

THE LEAGUE OF NATIONS

The Covenant of the League of Nations provided in Article 16 that:

Should any Member of the League resort to war in disregard of its covenants . . . it shall, *ipso facto*, be deemed to have committed an act of war against all other Members of the League. . . .

Pursuant to this article, it was stated in the course of the League's history that no state could, by unilateral act of aggression, create a state of war be-

¹ See Geneva Conventions of Aug. 12, 1949, U. S. Department of State Publication No. 3938 (1950). Conventions designed to replace all other conventions concerned with these matters were signed by some 59 nations, including all major Powers.

² Nussbaum, *A Concise History of the Law of Nations* (1947), pp. 242-244, 265-266.

³ Reports and Resolutions on the Subject of Article 16 of the Covenant, Report by the Secretary-General, League of Nations Doc. A. 14. 1927. V., p. 84.

⁴ For example, the Chinese Communist Army handbook has provided since 1928: Rule 8, "Do not maltreat captives." Lieberman, *New York Times Magazine* Section, Dec. 10, 1950, p. 52. See also *infra*, notes 28 through 31.

⁵ See Grob, *The Relativity of War and Peace* (1949), p. 332.

tween itself and other states.⁶ What the Covenant apparently looked toward was the creation of a formal state of war between a state violating its obligations and such Members as chose to oppose it with armed force under Article 16. In such a case, it seems clear that each state participating would be bound by the generally accepted laws of war as well as by those conventions and treaties dealing with the laws of war to which it had agreed. The Secretary General of the League agreed that "Article 16 appears to contemplate all or any measures consistent with the laws of war."⁷

Thus, in making war, League Members acted independently as states to declare war or perform warlike acts even when complying with Council recommendations and were considered as individual belligerents on whom the rules of war must certainly be binding.⁸ A French plan calling for a genuinely international armed force with a central staff was submitted to the Peace Conference but was rejected,⁹ so that Members were expected to participate as individual states, with the League serving merely to co-ordinate and make suggestions, and participants were to be bound by the rules of war applicable to the individual states. The League approach therefore added nothing significant to the pre-existing international law of war and consequently affords no direct precedent for the more integrated United Nations actions.

THE UNITED NATIONS

The Charter of the United Nations, unlike the Covenant of the League, makes no mention of "war." Rather it looks toward "preventive" or "enforcement" action by the United Nations forces.¹⁰ Furthermore, it provides for a potentially more centralized military force than would have been available to the League by outlining in Article 43¹¹ a procedure under which armed forces are to be made available for such use as is permitted by

⁶ Reports and Resolutions, *op. cit.* (*supra*, note 3), at p. 17.

⁷ *Ibid.*, at p. 87.

⁸ Oppenheim, *International Law* (6th ed., Lauterpacht, 1950), Vol. 2, p. 508; Reports and Resolutions, *op. cit.* (*supra*, note 3), at pp. 67, 69.

⁹ Reports and Resolutions, *op. cit.* (*supra*, note 3), at pp. 24-26.

¹⁰ Art. 2(5). Senator Connally's report to the United States Senate concerning participation by the United States in the United Nations contains this statement:

"Preventive or enforcement action by these forces (set up under Article 43) upon the orders of the Security Council would not be an act of war but would be international action for the preservation of the peace and for the purpose of preventing war." (U. S. Senate, 79th Cong., 1st Sess., Rept. No. 717.)

¹¹ "1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

"2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided."

the Charter. It also makes provision for a centralized staff and planning in Article 47. The contemplated agreements between the United Nations and its Members for the provision of these international forces have not, however, been effectuated.

Since the Charter envisages the possibility of various types of armed conflict, it is essential to point out that United Nations actions within the scope of this note are only those carried out by the international force created under Article 43 or by a force assembled by United Nations direction, under United Nations supervision and responsible to the United Nations, such as the army now fighting in Korea,¹² and possibly such a one as is envisaged by the Acheson proposals.¹³ Although joint action taken under Article 106 by the major Powers is on behalf of the United Nations, it is not a general United Nations action as these others would be, and the rules of war would certainly apply to states participating as old-fashioned belligerents. Similarly, self-defense activities under Article 51, while the Security Council fails to act, are in the nature of old-style war and there is no question of the applicability of the rules.

Despite the avoidance of the use of the term "war" in describing joint United Nations military operations, it seems that, in practice, the rules of war, or at least some of them, must nevertheless be applicable. Obviously, the name applied to a military operation (or lack of a name) cannot be depended upon in answering the question as to whether legal regulation of the military operations is needed.¹⁴ Some or all of the rules have been found applicable in the course of an "uprising," a border skirmish, an "incident," and in unnamed expeditions and "police actions," such as that of France in China in 1883 and of the United States in Haiti and the Dominican Republic.¹⁵ As further evidence of the tendency of the rules of war to become generalized international law, it should also be noted that while the older conventions are designed to come into effect in the event of "war between two or more of them [the signatories],"¹⁶ more recent con-

¹² See footnote 22 *infra*. President Truman has stated that the United States was not at war but was only engaged in a "police action" for the United Nations. New York Times, June 30, 1950, p. 1, col. 5.

¹³ "Uniting for Peace," U. N. General Assembly, Doc. A/1481 (Nov. 4, 1950).

¹⁴ Professor Jessup states:

"It is a mistake to assume that the acceptance of the concept of international police forces and their use against an 'outlaw', with its consequent abolition of the concept of 'war' in a legal sense, eliminates the necessity for the legal regulation of the rights and duties of those who are active participants in the struggle and of those who for geographical or other reasons are not called on to take an active part." A Modern Law of Nations (1948), p. 188.

¹⁵ Grob, *op. cit.* (*supra*, note 5), pp. 231, 288, 303.

¹⁶ *E.g.*: Hague Convention with Respect to the Laws and Customs of War on Land, Scott, Texts of the Peace Conferences at The Hague 1899 and 1907, p. 49; this JOURNAL, Supp., Vol. 2 (1908), p. 90.

ventions speak of "all cases of declared war or of any other armed conflict,"¹⁷ and such conflicts have been interpreted to include "informal" and "illegal" wars.¹⁸

In summary, it would appear that the mere fact that international military operations pursuant to the United Nations Charter are not formally designated as war and, in fact, are expressly said to be something else, does not alone eliminate the need for and applicability of at least some of the generally accepted rules of war.

LEGAL BASIS

There are, however, several technical difficulties in proving the rules of war necessarily legally binding on United Nations forces, for, although it is obvious that many rules of war are now regarded as binding as a matter of general international law, regardless of the actual consent of a state, the treaties and covenants which have codified and formulated the rules of war are, by their terms, technically binding only on the states ratifying the same and have sometimes been even further limited by such a device as a general participation clause. It is thus not self-evident that even such generally accepted rules as those expressed in the conventions signed at Geneva in 1949¹⁹ by most of the nations of the world could be shown to be technically binding on the unified forces of the United Nations. Additionally if the United Nations developed constitutionally and approached progressively nearer to the form of a world government, it would, of course, grow even more difficult to show the binding force on it of pre-existing rules, which were created by actions of its subordinates.

Furthermore, the United Nations, while not presently a government in the sense that it can legislate for its Member States, has sufficient international legal personality, for example, to enter into treaties with other international personalities such as those contemplated by Article 43 and to bring international claims for injuries to its agents.²⁰ As a consequence, the forces intended to be made available for United Nations purposes, can, consonant with its capacities, be thought of as a unified international police

¹⁷ Art. 2 of each of the four conventions signed at Geneva on Aug. 12, 1949 (The Geneva Conventions of Aug. 12, 1949. U. S. Department of State Publication No. 3938, 1950).

¹⁸ *Supra*, note 3.

¹⁹ U. S. Department of State Publication No. 3938 (1950).

²⁰ In the Advisory Opinion concerning Reparations for Injuries Suffered in the Service of the United Nations, rendered by the International Court of Justice on April 11, 1949 (I. C. J. Reports, 1949, p. 174), it is said, at page 179:

"Practice—in particular the conclusion of conventions to which the Organization is a party—has confirmed this character of the Organization, which occupies a position in certain respects in detachment from its Members. . . .

"... the Court has come to the conclusion that the Organization is an international person. . . . it is a subject of international law and capable of possessing international rights and duties . . ."

force rather than as a combination of allied national armies. Indeed, after the completion of military agreements between Members and the United Nations called for by Article 43, forces called upon to serve under international command might well be quartered, trained, fed and paid by the Organization. They would have to be integrated with each other, and it would be extremely difficult, if not impossible, for any commander of unified forces to determine what action various parts of his command might take if he had to consult the various agreements concluded at some time in the past by the government of the state originally furnishing the troops in question. As the representative of France on the International Law Commission, M. Scelle, declared, with such a force in existence, new rules for its regulation were needed, "the regulation of the employment of an international police force should be one of the chief preoccupations of the Commission . . . and there should be no further mention of the law of war."²¹

It seems obvious, then, that at least the *specific content* of the "rules of war" legally binding in United Nations actions has yet to be defined and cannot be deduced directly from League experience or Members' obligations.

In practice, the issue has been pointed by such a problem as that arising with regard to United Nations legal responsibility for war damages in a United Nations action. Since the start of the Korean conflict,²² the Soviet Union, maintaining that the Korean operation is a mere war of aggression by the United States, has several times addressed protests to the United States alleging violations of its territory and infringements of its rights. A note was sent to the United States in early October, 1950, for example, alleging the strafing of a Russian airfield. The Department of State asserted, however, that the question of an attack was purely a United Nations matter and that the note was not officially before the United States.²³ Later,

²¹ Summary Record, International Law Commission, U. N. Doc. A/CN. 4/SR. 6 (April 20, 1949), p. 13.

²² The writer believes that the Korean action is a lawful United Nations operation closely assimilated to that envisaged after the conclusion of Article 43 agreements; that the actions taken by the Security Council in this matter were legal and that, in any case, the forces in Korea fighting under the Unified Command, with the approval of the overwhelming majority of Members, are conducting what they consider to be a *bona fide* "United Nations action" and are consequently acting as if it were, which is sufficient for the purposes of this study. Nevertheless, since the legality of the original Security Council resolutions has been questioned; since some Members are actively opposing the action taken; and, more important, since the Council resolution (U. S. Doc. S/1588, July 7, 1950) creating a Unified Command further confused the issue by merely *recommending* that Members providing forces "make such forces . . . available to a unified command *under the United States*" and by requesting the *United States* "to designate the commander of such forces" and "to provide the Security Council with reports," and by leaving it in the discretion of the Unified Command as to whether the United Nations flag was to be used—all this evidencing a wide delegation of its powers by the Security Council to one Member—the writer feels that the value of Korean intervention as a legal precedent has been weakened. (*Italics added.*)

²³ New York Times, Oct. 11, 1950, p. 8, col. 5.

the attack was admitted in a note from the United States to the United Nations, and apologies and reparations were offered, but only through the United Nations, since it was insisted that the attacking planes were under United Nations, not United States, control and that only through the United Nations could the United States be responsible. This attitude contrasts sharply with the prompt direct payment made by the United States for its past breaches of the international laws of war²⁴ and also contrasts with the presumed responsibility of League Members. Of course, the American position leads back to the unresolved question of United Nations legal liability for such occurrences.²⁵

All in all, it cannot be said that the laws of war, in their old form, are *prima facie* binding on international forces on a strictly legal basis.

PRINCIPLE OF HUMANITY

Despite the problems of delineating the exact scope and content of United Nations obligations under the pre-existing rules of war, it seems manifest that United Nations forces are limited by the principles behind the rules of war due to a combination of legal, moral and practical considerations which are so intertwined that a differentiation is not practicable. As methods for the extermination of masses of people have advanced, rules have been developed for the conduct of warfare based on humanitarian sentiment as well as the notions of military utility and anticipation of retaliation.²⁶ The customs of war, followed by most or all nations, usually for long periods, have become, in a manner of speaking, a "custom of the trade" of armed conflict and United Nations armed forces must be restrained and limited by such rules.

The preamble to the Hague Convention of 1907 on the Laws and Customs of War on Land²⁷ states that populations should be protected by the rules "established among civilized peoples, from the laws of humanity, and the dictates of the public conscience," where the convention rules are lacking or inapplicable. The Charter of the United Nations notes in its preamble

²⁴ *E.g.*, payment to Switzerland for bombardment damages to Swiss territory in World War II. Grob, *op. cit.* (*supra*, note 5), at pp. 236-237.

²⁵ If the United Nations is bound by the rules of war and it has sufficient standing to make treaties, bring claims, etc., there seems no reason why, at least until it approaches the status of a true government, claims could not be presented against it before its own organs for illegal damages resulting from a legitimate action undertaken by it, whether such damages arise from injuries caused, products requisitioned or other cause. See opinion cited in note 20, *supra*. It would further appear that if the United Nations is legally liable, the Member whose citizens committed the act complained of should not usually be solely responsible for the entire cost of reparation.

²⁶ Jessup, *A Modern Law of Nations* (1948), p. 158.

²⁷ Scott, *op. cit.* (*supra*, note 16), at pp. 204-205, this JOURNAL, Supp., Vol. 2 (1908), p. 90.

that the Members reaffirm their faith "in the dignity and worth of the human person." No organization founded on such a basis can properly ignore rules designed to preserve and protect such dignity and worth.

As has been stated, a substantial number of rules for the more humane conduct of warfare have been established in general international law. In the first World War, the general participation clauses made the Hague Conventions technically inapplicable because not all the belligerents had ratified them, and yet the belligerents in general abided by them.²⁸ In the second World War even the Hitler Government, until almost the very end, observed some of its obligations under the Hague Convention on Prisoners of War and under the Geneva Red Cross Convention.²⁹ The German Government even took the trouble to "withdraw" Poland from the Geneva Red Cross Convention so that its discriminations against the Poles would be less noticeable.³⁰ Additionally, Japan, which never ratified the Geneva Convention, early announced that it would abide by its terms.³¹

It can be argued that general principles of international law required these actions. They certainly indicate the overwhelming acceptance of the basic principles at least, of the rules designed to humanize armed conflict, and the tendency of such rules to become general principles. It seems certain, therefore, that international forces should be required to act under the limitations of such long-standing and widely accepted principles as those requiring consideration for the life, health and property of prisoners of war and those requiring that normal civilian life in occupied territories be interfered with as little as possible consistent with the requirements of public order and, since an international policing operation is involved, consistent with the regulation of the disturbing factors which led to the need for such occupation.

During discussion of the United Nations action in Korea, the Indian representative on the Security Council said:

. . . we should be justified in taking all possible steps to be sure that the military operations authorized by this Security Council are conducted in accordance with the laws of civilized warfare. . . .³²

It is submitted that such conduct is required. The United Nations forces must, in short, behave in a manner consistent with the purposes and ideals of the Organization and, since the rules of war represent a general international attempt to humanize armed conflict, these forces must be subject to the principles embodied in such rules.

²⁸ Nussbaum, *op. cit.* (*supra*, note 2), at p. 247.

²⁹ *Ibid.*

³⁰ Patch, *Prisoners of War* (1942), p. 95.

³¹ U. S. War Dept. Communiqué of Jan. 24, 1942, *New York Times*, p. 2, col. 2.

³² Security Council, Official Records, 497th Meeting (Sept. 7, 1950), p. 15.

PRACTICE

As a matter of practice, both the United Nations forces involved in the Korean conflict and those of both North and South Korea have announced the binding force of certain rules of war on themselves.³³ On July 4, 1950, General MacArthur stated:

Personnel of the armed forces of North Korea and other persons of North Korea who are taken into custody or fall into the hands of armed forces now under my operational control in connection with hostilities in Korea will be treated in accordance with the humanitarian principles applied by and recognized by civilized nations involved in armed conflict.

I will expect similar treatment. . . .³⁴

On July 13, 1950, the Republic of Korea sent formal word that it would co-operate with the International Red Cross and would abide by the Geneva Convention on War Prisoners to which it adhered on July 6, 1950. On that same day, the North Korean radio stated that the North Koreans were "strictly observing the terms of the Geneva Conventions regarding prisoners of war."³⁵

The Unified Command has continued its operations on the basis of the binding force of the laws of war on it. The Third Report of the United Nations forces³⁶ reports that measures to avoid the killing of civilians are being enforced:

United Nations forces are urgently endeavoring to restrict destruction to the established military forces of the invader. . . . Civilians are warned daily (by radio, leaflets, etc.) to move away from military targets that must be bombed.

The report also states that the International Red Cross was at work in South Korea observing treatment of prisoners and noncombatants. The Fifth Report³⁷ states that:

United Nations personnel in charge of prisoner of war camps continue to observe scrupulously all the provisions of the Geneva Convention of 12 August 1949 relative to the treatment of prisoners of war.

³³ It should be noted that the position of the U. S. S. R. is that the United States is fighting an ordinary war of aggression in Korea and that the United States is of course bound by the rules of war agreed to by it, as "These provisions [Art. 25] of the fourth and [Art. 1] ninth Hague Conventions are in full force today, and the armed forces of the United States are obliged to observe them." Y. Malik, Security Council, Official Records, 497th Meeting (Sept. 7, 1950), p. 9. See note 22 *supra*.

³⁴ New York Times, July 5, 1950, p. 2, col. 7.

³⁵ *Ibid.*, July 14, 1950, p. 3, col. 4 (no Red Cross observers have been permitted to observe Communist forces in action nor have prisoners been properly reported).

³⁶ Security Council, Document S/1756 (Sept. 4, 1950), pp. 6, 7.

³⁷ Security Council, Document S/1834 (Oct. 5, 1950), p. 5.

Later reports are to the same effect. The Sixth Report³⁸ notes that books and pamphlets for prisoners are not being censored, in accordance with the Geneva Convention, and also lists enemy "violations of the laws of war reported by United Nations forces." The Seventh Report³⁹ notes the wide latitude given Red Cross observers.

It is apparent therefore that the international armed force involved in the Korean conflict considers itself bound by the generally accepted rules of war. It is proper that this be so, whatever the name given to such an international action, for such regulations can be considered legally binding upon an international armed force. Such delineations and changes as are necessary in the rules of war to accommodate them specifically to this new type of armed force must be made within the framework of the existing, recognized principles on which the specific rules are based.

³⁸ Security Council, Document S/1860 (Oct. 21, 1950), p. 9.

³⁹ Security Council, Document S/1883 (Nov. 3, 1950), p. 5.

THE TAGANAK ISLAND LIGHTHOUSE DISPUTE*

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The Treaty of Peace concluded in Paris between the United States and Spain on December 10, 1898, ending the Spanish-American war, provided in Article III that "Spain cedes to the United States the archipelago known as the Philippine Islands and comprehending the islands lying within the following lines. . . ."¹ In another treaty² concluded between the same countries on November 7, 1900, it was provided in the Sole Article that

Spain relinquishes to the United States all title and claim of title, which she may have had at the time of the conclusion of the Treaty of Peace of Paris, to any and all islands belonging to the Philippine Archipelago, lying outside the lines described in Article III of that Treaty and particularly to the islands of Cagayan Sulu and Sibutu and their dependencies, and agrees that all such islands shall be comprehended in the cession of the Archipelago as fully as if they had been expressly included within those limits.

A group of islands³ lying off the coast of North Borneo were claimed by the United States as part of the Philippine Archipelago ceded to it by Spain in the two treaties above mentioned, although they were then administered by the British North Borneo Company.⁴ In reply to the claim

* This article has been cleared for publication by the Department of Defense. The views expressed herein are those of the author and do not imply Department of Defense indorsement of factual accuracy or opinion.

¹ U. S. Treaty Series, No. 343.

² U. S. Treaty Series, No. 344.

³ The Turtle and Mangsee Islands. The center of the Turtle Island group lies about 30 miles north of Sandakan, North Borneo, and about 175 miles west of Jolo Island, the southwesternmost province of the Philippines. The Mangsee Islands lie still farther north and west of the Turtles off the north coast of Borneo. The location of the lighthouse in dispute, Taganak Island, lies 20 miles northeast of Sandakan and 22 miles south of the center of the Turtle group.

⁴ In claiming title to the islands as successor to Spain, the United States said: "The title of Spain to the Sulu Archipelago, of which Cagayan and Subutu formed part, rests on historical facts and repeated acts of submission of the Sulu chiefs to the Crown of Spain, and the territorial limits of Spanish jurisdiction in that quarter are stated in general terms in the protocols signed between Great Britain, Germany, and Spain in 1877, 1885, and 1897, from which it appears that Spain relinquished in favor of Great Britain all claim of sovereignty over the territories of the mainland of Borneo which then belonged or had belonged in the past to the Sultan of Sulu, including therein the neighboring islands of Balambangan, Banguey, and Malawali, as well as those islands lying

of the United States the British Government stated that

. . . there is no intention on their part to question the title of the United States to the islands aforementioned. His Majesty's Government desired only to ascertain whether the United States Government would be willing to forego their right to these islands, out of consideration for the fact that the North Borneo Company had during many years carried on the administration of them under the apparent belief that the islands formed part of the company's territory, and as the company attached importance to being permitted to retain control over them.⁵

In an exchange of notes dated July 3 and 10, 1907,⁶ the United States and Great Britain agreed on the following arrangement with respect to these islands:

Firstly: that the said Company be left undisturbed in the administration of the islands in question without any agreement specifying details, the United States Government simply waiving in favour of said Company the right to such administration in the meantime, in other words, that the existing status be continued at the pleasure of the two Governments concerned.

* * *

Fifthly: that the understanding shall continue until the said two Governments may by Treaty delimit the boundary between their respective domains in that quarter, or until the expiry of one year from the date when notice of termination be given by either to the other.

On January 2, 1930, the United States and Great Britain finally concluded a convention⁷ wherein the boundary between the Philippine Archipelago and the State of North Borneo was delimited. By this convention the sovereignty over the islands in question was definitely recognized as pertaining to the United States. On the same day that the convention was signed the two governments exchanged notes⁸ wherein we find the following:

Firstly. That the said company be left undisturbed in the administration of the islands in question⁹ unless or until the United States Government give notice to His Majesty's Government of their desire that the administration of the islands should be transferred to them. The transfer of the administration shall be effected within one year

within a zone of 3 marine leagues along the coast, and which form part of the territories administered by the company styled British North Borneo Company, while as to the rest of the islands pertaining to her under the Suluan capitulations and submissions Spain reserved and was admitted to have sovereignty whether they were effectively occupied by Spain or not." See letter of Secretary of State (Hay) to the British Ambassador, dated Dec. 10, 1904. *Foreign Relations of the United States* (1907), Part 1, p. 542.

⁵ Letter of the British Ambassador (Durand) to the Secretary of State, dated Sept. 29, 1905. *Ibid.*

⁶ U. S. Treaty Series, No. 856.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ On July 15, 1946, the British Government took over the Borneo sovereign rights from the British North Borneo Company pursuant to the agreement of June 26, 1946. Great Britain, Appendix of Prerogative Orders, No. 7, 1 Statutory Rules and Orders (1946), p. 2347.

after such notice is given on a day and in a manner to be mutually arranged.

* * *

Thirdly. . . . In the event, however, of the island of Taganak being so transferred, the United States Government will give favourable consideration to the question of the compensation to be paid to the said company in respect of the capital expenditure incurred by the company in connection with the lighthouse situated on the island, and that the United States Government will provide for the future maintenance of the lighthouse.

* * *

Seventhly. In the event of the cession, sale, lease, or transfer of the islands in question to any third party, the United States Government undertake to use their good offices in commending to the favourable consideration of such third party the desires expressed by His Majesty's Government in the United Kingdom and the British North Borneo Company, as set out in the preceding articles of the present arrangement.

When, on July 4, 1946, the Philippines became an independent republic, the islands named in the above-mentioned convention and notes were divorced from the sovereignty of the United States by virtue of their being part of Philippine territory.¹⁰

In a letter to the British Chargé d'Affaires in Manila, dated September 19, 1946, the Philippine Secretary of Foreign Affairs gave formal notice of the desire of the Philippine Government to take over the administration of the islands. In June, 1947, the British Government, stressing the importance of a strong police force and of the lighthouse at Taganak Island, requested the Philippine Government to reconsider its decision and leave the administration of said islands to the North Borneo Government because "these islands are so far from the nearest Philippine administrative base that . . . it would be in the best interests of both the Philippine and the North Borneo Government for the latter to remain responsible for the administration of the islands."¹¹ The proposed arrangement would be without prejudice to Philippine sovereignty. Notwithstanding its proposal, the British Government agreed with a Philippine Government pro-

¹⁰ The Constitution of the Philippines (33 Philippine Official Gazette, p. 729), approved by the President of the United States on March 23, 1935, defines Philippine territory as comprising ". . . all territory ceded to the United States by the treaty of Paris concluded between the United States and Spain on the tenth day of December, eighteen hundred and ninety-eight, the limits of which are set forth in Article III of said treaty, together with all the islands embraced in the treaty concluded at Washington, between the United States and Spain on the seventh day of November, nineteen hundred, and the treaty concluded between the United States and Great Britain on the second day of January, nineteen hundred and thirty, and all territory over which the present Government of the Philippine Islands exercises jurisdiction." Art. I, Sec. 1.

¹¹ Letter of British Foreign Service Officer, N. E. Denning, to the Philippine Secretary of Foreign Affairs, dated June 6, 1947.

posal to set up a joint committee to consider and report on various questions relating to the administration of the islands.¹²

The joint committee was set up and made an inspection of the islands. Later, after receiving the report of the Philippine Delegation, the Philippine Government, on September 24, 1947, made known its decision to take over immediately the administration of the islands, at the same time assuring the British Government that an adequate police force would be maintained thereon; but as to the request of the British Government that the Philippine Government pay for the capital cost of the lighthouse at Taganak Island and provide for its future maintenance, the Philippine Government answered as follows:

. . . In connection with the lighthouse at Taganak, it appears that the same has been severely damaged, that it has not been in operation since its destruction during the war, and that while useful to North Borneo it has practically no utility for the Philippines. It is the view of my government that when the United States undertook in the notes of 1930 to consider favourably the question of the payment of the capital expenditure incurred in the construction of the lighthouse, the undertaking presupposed that the lighthouse be in working condition at the time of the transfer of the islands and that its operation be also necessary or will provide some public benefit to the United States or its successor, the Philippines. . . .¹³

While rejecting the British request, the Philippine Government at the same time proposed to lease to the North Borneo Government the site absolutely needed for the lighthouse at Taganak at a nominal rental of one peso per annum "for as long a period as North Borneo needs and desires to use the lighthouse."¹⁴ The Philippine Government stated that the proposed arrangement would enable North Borneo to operate at its expense a service that it needs and at the same time keep the Philippine Government from maintaining a service that it does not need and which would be difficult to justify to the people of the Philippines.

The administration of the islands was to be assumed by the Philippine Government on October 2, 1947,¹⁵ but actually the islands were taken over on October 16, 1947, without prejudice, however, to further discussion of various points involved in the transfer, particularly the question of the lighthouse at Taganak Island.¹⁶

On May 26, 1948, the British Minister in Manila wrote to the Philippine Secretary of Foreign Affairs stating in part as follows:

¹² *Ibid.*

¹³ Letter of the Philippine Secretary of Foreign Affairs to the British Minister in Manila, dated Sept. 24, 1947.

¹⁴ *Ibid.*

¹⁵ Letter of the Philippine Secretary of Foreign Affairs to the British Minister in Manila, dated Sept. 24, 1947.

¹⁶ Letter of the British Minister in Manila to the Philippine Secretary of Foreign Affairs, dated April 20, 1948.

. . . By arranging for the transfer of the Turtle and Mangsee Islands from British to Philippine administration His Majesty's Government have clearly demonstrated that the Government of the Republic of the Philippines have succeeded to the rights and obligations of the Government of the United States under the Anglo-American Convention signed at Washington on the 2nd January, 1930, and the subsequent Exchange of Notes. They wish, in particular, to call the attention of the Philippine Government to the following passage¹⁷ from Mr. Stimson's note to Sir Esme Howard of the 2nd January, 1930 on the subject of the Taganak lighthouse, whose importance to shipping has already been stressed; . . . His Majesty's Government consider that these words impose upon the Government of the Philippines specific obligations, which are in no way affected by the fact that the lighthouse was largely destroyed during the recent hostilities, both with regard to the capital cost and the future maintenance of the lighthouse. They wish to remind the Government of the Philippines that it is in any case an accepted obligation of sovereign states to ensure the safety of shipping about their coasts by assuming responsibility for the provision of lighthouses and other necessary navigational aids. . . .

On July 23, 1949, the Philippine Government answered the above letter and stated that it had given consideration to the views expressed by the British Government but that it could not see its way clear to deviate from its previous position. The Philippine Government did admit the existence of a moral obligation of sovereign states to ensure the safety of shipping along their coasts by providing necessary navigational aids consistent with financial ability.¹⁸

The above, in brief, is the status of the negotiations between the Philippine and British governments over the lighthouse at Taganak Island.

The exchange of communications between the Philippine and British governments reveals that the latter desires the former to pay the capital cost of the lighthouse at Taganak Island and to continue its maintenance, based on the following propositions: (a) that the Philippine Government succeeded not only to the rights but also to the obligations assumed by the United States in the exchange of notes of January 2, 1930, and (b) that at any rate it is the obligation of the Philippines as a sovereign state to maintain the lighthouse in order to ensure the safety of shipping about its coasts.

It might well be asked whether the Philippine Government succeeded to the obligations assumed by the United States in the exchange of notes of January 2, 1930. Here it may be said that the Philippine Government tacitly admitted that it is bound by the obligations assumed by the United States in the said exchange of notes. Nevertheless, in connection with the lighthouse at Taganak Island, the Philippine Government attempted to avoid complying with the admitted obligations by reading into the exchange

¹⁷ The third paragraph of the note.

¹⁸ Letter of the Philippine Undersecretary of Foreign Affairs to the British Minister in Manila.

of notes an implied condition to the following effect: "This undertaking presupposes naturally that the lighthouse be in working condition at the time of the transfer and that its operation is necessary and will provide some public benefit to the United States or its successor, the Philippines."¹⁹ In addition the Philippine Government claimed that

In the ocular inspection of the lighthouse by the joint Philippine-British Committee, it was found to be in such a worn-down and damaged condition as to be practically non-serviceable. It was also found that the operation of this lighthouse is exclusively for the benefit of Sandakan Harbor and that no Philippine shipping of any kind is served thereby.²⁰

It would seem that the attempt of the Philippine Government to read into the exchange of notes of January 2, 1930, an implied condition is hardly justified. The plain wording of the paragraphs entitled "Thirdly" precludes the reading of such a condition. On the other hand it would seem that the Philippine Government may very well avoid the claim of the British Government on the first proposition by simply relying on a strict construction of the aforesaid notes. Thus the paragraphs entitled "Seventhly" state that

In the event of the . . . transfer of the islands in question to any third party, the United States Government undertakes to use its good offices in commending to the favourable consideration of such third party the desires of His Majesty's Government . . . as set out in the preceding articles of the present arrangement.²¹

From this passage it may very well be argued that at the time the arrangement between the United States and Great Britain was concluded they did not contemplate passing on to a transferee of the United States the obligations assumed by the United States Government as embodied in the paragraphs entitled "Thirdly." In other words, the obligations were assumed by the United States solely and were not to pass to its successor for, otherwise, there would have been no need to provide in the notes that the United States would use its good offices in commending to the favorable consideration of the transferee the desires of the British Government as set out in the notes. Adding force to this argument is the fact that when the Philippine Independence Act ²² was passed by Congress in 1934, a detailed enumeration was made in the Act of the obligations to be assumed by the independent Philippine Government,²³ but nowhere in the Act is there any mention made

¹⁹ Letter of the Philippine Undersecretary of Foreign Affairs to the British Minister in Manila, dated July 23, 1949.

²⁰ *Ibid.*

²¹ In a letter dated Feb. 10, 1950, the writers were informed by the U. S. State Department that "a check of the files in the Department of State fails to reveal that the British Government has at any time requested the United States Government to use its good offices in connection with the disagreement between the Philippines and Great Britain concerning the lighthouse at Taganak Island."

²² Public Act No. 127, 73d Congress.

²³ Section 2 (b).

of the obligations assumed by the United States in favor of the British Government in relation to the lighthouse at Taganak Island.

As to the claim of the British Government that it is the obligation of the Philippines as a sovereign state to ensure the safety of shipping along its coasts, the Philippine Government has acknowledged a moral obligation to provide, along its coasts, necessary navigational aids consistent with its financial ability.²⁴ The Philippine Government claims that by proposing to lease the lighthouse site to the North Borneo Government at a nominal rental it thus discharges its acknowledged moral obligation,²⁵ leaving the actual reconstruction and maintenance of the lighthouse to the British Government. Whether this proposal of the Philippine Government is sufficient to discharge it from its obligation presents an interesting problem.

The extent of the responsibility of states to provide navigational aids along their coasts does not appear to have been specifically defined. There would appear to be no problem along coasts where domestic shipping is inbound to ports of the state, for it would be to the interest of the state there to provide such aids. However, the problem is pointed where foreign shipping is in transit along the coasts of the state in question. In these cases there appears to be no fixed and certain rule of responsibility. Analogous precedents bear out this lack of definite responsibility. In 1864, as the result of several shipwrecks off the coast of Morocco near Gibraltar, the Sultan of Morocco built a lighthouse on Cape Spartel. A previous Spanish-Moroccan treaty of commerce stated in part:

Experience has shewn that the lack of a light . . . exposes navigation to great risk and losses, and His Shereefian Majesty desirous of contributing as far as possible to the security and development of the aforesaid commerce and navigation pledges himself to construct a lighthouse on Cape Spartel and to take charge of its lighting and upkeep.²⁶

Then in 1865 a convention as to the Cape Spartel lighthouse was concluded between Morocco and eleven other states.²⁷ The heads of these states "moved by a like desire to assure the safety of navigation along the coasts of Morocco, and desirous to provide, of common accord, the measures most proper to attain this end . . . :

Article I

His Majesty Scheriffene, having, in an interest of humanity, ordered the construction, at the expense of the Government of Morocco, of a

²⁴ Letter of the Philippine Undersecretary of Foreign Affairs to the British Minister in Manila, dated July 23, 1949.

²⁵ *Ibid.*

²⁶ Joaquín Velez Villanueva, *Recopilación Legislativa en la Zona de Influencia de España en Marruecos, en la de Tanger y en la de Francia* (Madrid, 1917), p. 23.

²⁷ These states were: United States, Austria, Belgium, France, Great Britain, Italy, The Netherlands, Portugal, Spain, Sweden, and Norway. The Cape Spartel Lighthouse Convention appears in U. S. Treaty Series, No. 245.

light-house at Cape Spartel consents to devolve . . . the administration on the . . . contracting Powers.

Article II

The Government of Morocco not at this time having any marine either of war or commerce, the expenses necessary for upholding and managing the lighthouse shall be born by the contracting Powers. . . . If, hereafter, the Sultan should have a naval or commercial marine, he binds himself to take share in the expenses. The expenses of repairs, and in need of reconstruction shall also be at his cost.

Neither the language nor the actions of the Powers concerned in the Cape Spartel lighthouse situation suggests in any manner a responsibility on the part of Morocco to build and maintain a lighthouse, despite numerous shipping accidents because of the lack of a lighthouse. True, the Sultan of Morocco did construct a lighthouse, but the words used to describe this intended action clearly indicate a philanthropic intention on the part of the Sultan, bolstered no doubt by the fact that some of the foreign shipping involved was inbound to a Moroccan port—Tangier. Further, the words of the convention, instead of stating, or at least hinting at, a responsibility of Morocco to sustain the lighthouse, quite to the contrary indicate a responsibility on the part of the using states to support the needed navigational aid.²⁸

In a convention of 1866 establishing tariff duties between Japan and four other states,²⁹ Article XI states:

The Government of Japan will provide all the Ports open to Foreign trade with such lights, buoys and beacons as may be necessary to render secure the navigation of approaches to the said Ports.

Here, although Japan did agree to provide navigational aids, it did so in a convention where mutual co-operation was necessary, and where, although the language of the convention could naturally have indicated a Japanese responsibility so to provide the aids mentioned, such wording is conspicuously lacking, thus lending itself readily and, we submit, logically to the conclusion that no such responsibility was supposed.

In 1930 a Conference for the Unification of Buoyage and Lighting of Coasts³⁰ was held at Lisbon by several states.³¹ In the agreement concerning maritime signals, the following language is used:

Article 2. The provisions of the . . . Regulations may be departed from . . . particularly . . . where the expenditure involved be out of proportion to the traffic concerned.

²⁸ Preamble to the convention. See U. S. Treaty Series, No. 245.

²⁹ Convention establishing tariff duties between Japan and the United States, Great Britain, France, and The Netherlands. U. S. Treaty Series, No. 188.

³⁰ League of Nations Docs. C.634. M.253 (1930), Vol. III, p. 13.

³¹ These were: Germany, Belgium, Cuba, Spain, Estonia, Finland, France, Morocco, Tunis, Greece, Monaco, The Netherlands, Portugal and Sweden.

The necessity for proper navigational aids is specifically dispensed with where the cost is disproportionate to the traffic. This statement clearly negatives any definite responsibility by any state to provide navigational aids.

In the case at hand, the Island of Taganak is situated outside the mouth of Sandakan Harbor. Sandakan is on the Island of Borneo. No Philippine shipping of any kind is served by the lighthouse thereon.⁵² To find a responsibility on the part of the Philippine Government to rebuild and maintain this lighthouse would not only go against the dictates of reason but would also be contrary to such analogous cases as exist. In the Cape Spartel case no responsibility on the part of Morocco to maintain a lighthouse is mentioned nor can it be inferred, and there the Government of Morocco was at least interested in shipping en route to its ports. Here no shipping that would benefit by the lighthouse is bound for Philippine ports. In the Japanese convention all the states concerned were making concessions of a kind, and Japan had a real interest in the shipping that she agreed to protect. Here again the shipping to be protected is of no benefit to the Philippine Government and, further, there is no mutually agreed upon contract to urge Philippine concession. In the Lisbon conference a mutual agreement was drawn up whereby all the signatory states were benefited and clearly no responsibility was declared. Here again there is no benefit to Philippine shipping. In addition, should a responsibility be found in this case requiring the Philippine Government to rebuild and maintain the lighthouse at Taganak Island, such a finding would be a basis for a precedent requiring a state to provide navigational aids to any foreign shipping that happens to pass near any island, reef, shoal or rock under the sovereignty of the state—even to the extent of ignoring considerations of cost and traffic. Although this step would be carrying the precedent out to the "dryly logical extreme" that has moved Mr. Justice Cardozo to abhorrence, the above basis would definitely suggest such action.

It would seem, therefore, that the Philippine Government is justified in refusing to pay for the capital cost of the lighthouse at Taganak Island and in refusing to provide for its maintenance. The Philippine Government did not succeed to the obligations assumed by the United States in the exchange of notes of January 2, 1930. Neither is the Philippine Government, under present circumstances, under any legal or moral obligation to provide navigational aids to shipping on Taganak Island.

⁵² Letter of the Philippine Undersecretary of Foreign Affairs to the British Minister in Manila dated July 23, 1949.

NOTES ON LEGAL QUESTIONS CONCERNING THE UNITED NATIONS

By YUEN-LI LIANG *

RECOGNITION BY THE UNITED NATIONS OF THE REPRESENTATION OF A MEMBER STATE: CRITERIA AND PROCEDURE

The question of recognition by an international organization of the representation of a Member State, a question recently considered by the General Assembly of the United Nations as a result of a proposal by Cuba, had previously engaged the attention of several international bodies. For instance, after the Italian conquest of Ethiopia, the Credentials Committee of the Assembly of the League of Nations was confronted with the issue of the seating of Ethiopian representatives in the Assembly. Referring to the situation then existing in Ethiopia, the Committee, in its report to the Assembly, stated:

The Head of the State is in a foreign country; the Government of the State is no longer in the capital; according to some of the documents submitted, a governmental authority is stated to be established in another part of the country. It seems exceptionally difficult to judge of the nature and the extent of the power of that authority, and of the strength of the connections still existing between it and the Head of the State. The question that accordingly presented itself to the Committee was whether the Head of the State, from whom the credentials under examination emanate, was exercising his legal title effectively enough to make those credentials perfectly in order.¹

The Committee at one time thought of proposing that the Assembly should ask the Permanent Court of International Justice to give an advisory opinion on the question. However, in view of the fact that the Assembly would probably have come to an end before the Court could give its opinion, the Credentials Committee invoked the provisions of Rule 5, paragraph 4, of the Rules of Procedure of the Assembly, stipulating that, unless the Assembly decided otherwise, any representative to whose admission objection had been made should sit provisionally with the same rights as other representatives. The Ethiopian credentials were therefore considered as suffi-

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¹ League of Nations, Records of 17th Assembly, 1936, Plenary, p. 40.

cient to permit the Ethiopian Delegation to sit at that session of the Assembly.²

In 1944, at the twenty-sixth session of the International Labor Conference, an objection was lodged by the United Slav Committee concerning the nomination of the delegates by the Government of Yugoslavia, and a request was made that the National Committee of Liberation of Yugoslavia be invited to send its delegation to the Conference. The Credentials Committee of the Conference expressed the opinion that since the government which appointed the delegates was generally recognized by the other members of the Organization and the Committee of National Liberation had not been recognized as the government of Yugoslavia by any member of the Organization, the government delegates of Yugoslavia should be regarded as duly accredited to that session of the Conference. The report of the Credentials Committee further stated:

The Committee is, however, impressed with the difficulties which would have confronted it if there had been divergencies between the recognition policies of the different members of the Organization in relation to Yugoslavia. . . . It therefore asks the Conference to request the Governing Body to consider the whole subject of procedure to be followed in any future case in which a question involving recognition of a State or a Government may arise in connection with the activities of the International Labour Organization.³

In the following year, at the twenty-seventh session of the International Labor Conference, an objection to the credentials of the government representatives of the Argentine Republic was raised by the Workers Group at the Conference on the ground that the government which appointed the representatives to the Conference was a Fascist government. The objection was considered by the Credentials Committee of the Conference which reported:

The Argentine Republic is one of the signatories of the United Nations Charter, adopted at San Francisco on 26 June 1945. As the United Nations Organization was thus made open to the Argentine Republic, and as the States which constitute that Organization maintain with it all the relations which derive from the circumstances mentioned above, the Credentials Committee considers that it would serve no purpose for it to examine the credentials of the representatives of the Government of the Argentine Republic at the twenty-seventh session of the International Labour Conference, except as regards their duly verified formal correctness.⁴

² *Ibid.*, pp. 40-42. See H. Lauterpacht, "The Credentials of the Abyssinian Delegation to the Seventeenth Assembly of the League of Nations," *British Year Book of International Law*, Vol. 18 (1937), p. 184.

³ International Labor Conference, *Records of Proceedings*, 26th Sess., 1944, p. 292 (Second Report of the Credentials Committee). The Conference adopted the Report without taking further action on its proposal.

⁴ *Ibid.*, 27th Sess., 1945, p. 321 (Seventh Report of the Credentials Committee).

In 1945, at the San Francisco Conference, one of the amendments introduced by Norway to the Dumbarton Oaks Proposals provided that the General Assembly of the United Nations Organization be given "the right to present recommendations to Member States with regard to the recognition of new Governments or new States."⁵ This amendment was later withdrawn by the Norwegian Delegation, which considered that the point in question was "covered by the amendment to Chapter V.B.6 (of the Dumbarton Oaks Proposals) suggested by the four Sponsoring Governments."⁶ Although this proposal was limited to substituting collective recognition for individual recognition, it might, if adopted, have had some effect on the consideration by the General Assembly of the question of representation of a Member State in the United Nations.

I. THE QUESTION OF CHINESE REPRESENTATION

Some months before the opening of the fifth session of the General Assembly in September, 1950, the right of the Chinese National Government to represent China in the United Nations had been challenged by the Soviet Union in various organs of the United Nations and in specialized agencies. The question of Chinese representation was first raised in the Security Council by the Soviet representative on December 29, 1949. A few days later, the Soviet Union submitted to the Council a draft resolution proposing that the Council should decide not to recognize the credentials of the representative of the "Kuomintang Group."⁷ In this connection, the Indian representative observed that if a question of representation and credentials was to be decided by the Security Council or other organ concerned without any guidance, there was a danger that different organs of the United Nations might decide it by their own majorities in their own different ways. He suggested that some uniform procedure, which could be adopted by all the organs, was obviously desirable in order that the chances of conflicting decisions might be minimized. Accordingly, he submitted to the Security Council two amendments to the Provisional Rules of Procedure of the Council concerning representation and credentials of members of the Council. The text of the amendments read as follows:

⁵ U.N.C.I.O., Vol. III, Doc. 2, G/7(n)(1), May 4, 1945, pp. 366-367.

⁶ U.N.C.I.O., Vol. II, Doc. 365, EX-SEC/10, p. 567. The amendment of the four Sponsoring Governments, referred to by the Norwegian Delegation, read: "Subject to the provisions of paragraph 1 of this Section, the General Assembly should be empowered to recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the Purposes and Principles set forth in this Charter." *Ibid.*, Vol. III, Doc. 2, G/29(a), May 11, 1945, p. 629. This amendment was subsequently adopted in substance as Art. 14 of the Charter.

⁷ U. N. Doc. S/1443. Upon the rejection of the Soviet draft resolution, the representative of the Soviet Union withdrew from the Council. See Security Council, 5th Year, Official Records, No. 3, p. 10.

In Rule 13, before the last sentence, insert the following:

"The credentials shall be issued either by the head of the State or the Government concerned or by its Minister of Foreign Affairs."

After Rule 17, insert the following:

"Where the right of any person to represent, or to continue to represent, a State on the Security Council, or at a meeting of the Security Council, is called in question on the ground that he does not represent, or has ceased to represent, the recognized Government of the State, the President of the Council shall, before submitting the question to the decision of the Council, ascertain (by telegraph if necessary) and place before the Council, so far as advisable, the views of the Governments of all other States Members of the United Nations on this matter."⁸

On January 17, 1950, the Security Council agreed to refer the Indian representative's proposal to its Committee of Experts for study and report.⁹ The Committee of Experts considered this question at its 113th through 115th meetings, in which the representative of Cuba presented the argument that under Articles 10 and 13 of the Charter neither the Security Council nor any other organ of the United Nations, except the General Assembly, was competent to carry out studies and recommend uniform solutions on matters affecting the Organization as a whole.¹⁰ In his opinion

the distinction between credentials and representation was a legal and political reality which could not be denied. The credentials only certified the powers conferred by a State to its representatives. Representation, on the other hand, was the right of a Government to act on behalf of the State. Consequently, objections which could be levelled against credentials did not necessarily affect the legitimacy of the representation of the Government which had issued those credentials; but objections levelled against the representation of a Government must necessarily affect the very capacity or right of that Government to act or have itself represented on behalf of a State.¹¹

He concluded that the problem of representation should be solved for the Organization as a whole.

On February 14, 1950, the Committee of Experts submitted to the Security Council its report, which stated that there was no objection to the first Indian amendment to Rule 13, but that, with respect to the proposed Rule 17-A, "it was the opinion of the majority that the question under discussion was of such a nature that the General Assembly should be the organ of the United Nations to initiate the study and to seek uniformity and co-

⁸ U. N. Doc. S/1447, Jan. 13, 1950, p. 2.

⁹ Security Council, 5th Year, Official Records, No. 4, p. 13.

¹⁰ U. N. Docs. S/C.1/SR.113 (p. 5) and 114 (p. 2).

¹¹ U. N. Doc. S/C.1/SR.113, pp. 3-4. See also Doc. A/1303, p. 4.

ordination with regard to the procedure governing representation and credentials.”¹²

On March 8, 1950, a memorandum on the “Legal Aspects of the Problem of Representation in the United Nations” was circulated by the Secretary General to the members of the Security Council in which it was stated:

The primary difficulty in the current question of the representation of Member States in the United Nations is that this question of representation has been linked up with the question of recognition by Member Governments.

The recognition of a new State, or of a new government of an existing State, is a unilateral act which the recognizing government can grant or withhold. . . .

On the other hand *membership* of a State in the United Nations and *representation* of a State in the organs is clearly determined by a collective act of the appropriate organs; in the case of membership, by vote of the General Assembly on recommendation of the Security Council, in the case of representation, by vote of each competent organ on the credentials of the purported representatives. . . .¹³

On the basis of this analysis, the memorandum suggested certain principles to be applied by organs of the United Nations in cases where two rival governments claimed to represent a Member State in the United Nations.

On February 7, 1950, at the tenth session of the Economic and Social Council, a draft resolution submitted by the Soviet Union proposing to “exclude the representative of the Kuomintang group” from the Council was rejected. The representative of India commented that, under the provisions of its rules of procedure, the Council was required to examine the credentials of its members and that it was not competent to take a decision of the nature suggested by the Soviet representative.¹⁴

On June 1, 1950, the Trusteeship Council, at its seventh session, rejected a Soviet draft resolution similar to the one submitted by the Soviet Union to the Economic and Social Council. During the discussion, the representative of France explained that his delegation took the view that it would be inappropriate for the Council to take any decision on the question raised by the Soviet proposal, since it was a question that went beyond the sphere of procedure and concerned not only the states represented on the Council but all the States Members of the United Nations.¹⁵

On May 30, 1950, the General Conference of the United Nations Educational, Scientific and Cultural Organization, upon the recommendation of

¹² U. N. Doc. S/1457, p. 2. At its 468th meeting, the Security Council approved the conclusions of the Committee of Experts on this subject. See Security Council, 5th Year, Official Records, No. 10, p. 11.

¹³ U. N. Doc. A/1466, pp. 2-3.

¹⁴ Economic and Social Council, 5th Year, Official Records, 10th Sess., 344th meeting, p. 2.

¹⁵ Trusteeship Council, 7th Sess., Official Records, 1st meeting, p. 2.

its Credentials Committee, adopted a resolution expressing the wish "that the United Nations adopt general criteria by which it may be possible to reach a uniform and practical settlement of the problem of the representation on the various organs and organizations of the United Nations of countries of which two or more authorities claim to be the only regular government," and that "this question be considered as soon as possible, in view of the serious difficulties to which the present situation in China is giving rise."¹⁶

II. SUGGESTED CRITERIA CONCERNING THE RECOGNITION OF REPRESENTATION IN THE UNITED NATIONS

It was probably in view of these developments that Cuba requested, by a letter dated July 19, 1950, to the Secretary General of the United Nations, that the item "Recognition by the United Nations of the Representation of a Member State" be placed on the provisional agenda of the fifth session of the General Assembly.¹⁷ On September 22, 1950, the General Committee of the General Assembly, after a brief discussion, recommended that the item proposed by Cuba be included in the agenda of the General Assembly and that it be referred to the Ad Hoc Political Committee.¹⁸ This recommendation was later approved by the General Assembly.¹⁹

Two draft resolutions were submitted to the Ad Hoc Political Committee, one by Cuba²⁰ and one by the United Kingdom,²¹ each of which contained, *inter alia*, a number of criteria to be applied for determining which government should be considered as representing a Member State in a case where two governments contend for representation. During the general debate in the Committee, various amendments to the two draft resolutions were submitted, mostly with a view to making these criteria more detailed. The Committee later decided to establish a subcommittee to consider and discuss the problem of representation as a whole, "in the light of the debate, all points raised in the proposals, suggestions, and amendments, and to report on them with recommendations."²² The subcommittee's report and draft resolution²³ also set forth certain criteria in more or less modified terms. During the entire discussion of the problem both in

¹⁶ See U. N. Doc. A/1344, Sept. 6, 1950, p. 2.

¹⁷ U. N. Doc. A/1292. By a letter dated July 26, 1950, the representative of Cuba submitted an explanatory memorandum on this item. See U. N. Doc. A/1308.

¹⁸ General Assembly, 5th Sess., Official Records, General Committee, 70th meeting, p. 10 (see also Doc. A/1386, p. 11).

¹⁹ General Assembly, 5th Sess., Official Records, Plenary Meetings, 285th meeting, Sept. 26, 1950, p. 115.

²⁰ U. N. Doc. A/AC.38/L.6, Oct. 7, 1950.

²¹ U. N. Doc. A/AC.38/L.21, Oct. 31, 1950.

²² General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, 24th meeting, p. 160.

²³ U. N. Doc. A/AC.38/L.45, Nov. 21, 1950.

the Ad Hoc Political Committee and in its subcommittee, the views of the delegations on the establishment of such criteria were many and varied. An analysis of the proposed criteria and the opinions expressed thereon is given below.

1. *The Cuban Draft Resolution and Amendments Thereto*

Paragraph 1 of the operative part of the Cuban draft resolution provided that the General Assembly recommend that

questions arising in connection with the representation of a Member State in the United Nations should be decided in the light of: (a) effective authority over the national territory; (b) the general consent of the population; (c) ability and willingness to achieve the Purposes of the Charter, to observe its Principles and to fulfill the international obligations of the State; and (d) respect for human rights and fundamental freedoms.²⁴

Some representatives thought that these criteria should be supplemented so as to make their meaning more clear and definite; others were either opposed to these criteria or considered that certain criteria were not sound or had little chance of securing general approval. The views in the Committee may be summarized as follows:

With respect to the first criterion, most delegations spoke in its favor, but opinions differed as to its interpretation. On the one hand, the Soviet Delegation considered that "in the matter of recognition of representation of Member States, United Nations organs should follow the principle of admitting only representatives appointed by a government exercising effective power in the Member State concerned";²⁵ and the United Kingdom Delegation thought that this was an objective test which was sanctioned by international law. On the other hand, the Uruguayan Delegation considered that the effective authority should have been acquired by means which were in accordance with international law; accordingly, it proposed to add after the words "national territory" the phrase "established without the intervention of any other State."²⁶

The Chinese representative stated that authority over a territory could not be considered effective as long as there was persistent and organized resistance by the people or the existing legal government which the new regime sought to overthrow, and added that the new regime might have come into power as a result of foreign intervention.²⁷ Therefore, the Chinese Delegation proposed that the first criterion suggested by Cuba be amended

²⁴ U. N. Doc. A/AC.38/L.6, Oct. 7, 1950.

²⁵ General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, 18th meeting, p. 122.

²⁶ U. N. Doc. A/AC.38/L.11, Oct. 10, 1950.

²⁷ General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, 18th meeting, pp. 112-113.

to read: "effective authority over the national territory, established without the intervention of any other State, independent of foreign control and domination, and not as a result of aggression, direct or indirect."²⁸ The United States representative doubted whether a so-called objective test existed and observed that "even in applying the criterion of control between two competing regimes, the question whether the people freely accepted either or both regimes might be considered in determining whether either regime had real control over the State. That was a question which could not be determined automatically."²⁹ The representative of Costa Rica also contended that there were many governments effectively controlling the national territory whose authority could be attributed either to the people's inability to revolt or to the support assured them by a foreign state. He gave the case of Manchuria as an example and concluded that the application of the principle of effective authority alone might well be inequitable.³⁰

With regard to the second criterion, an amendment was submitted by the Chinese Delegation to the effect that the general consent of the population should be "expressed through freely conducted or internationally supervised or observed elections."³¹ While several delegations spoke in favor of the Cuban formula, the representative of the United Kingdom thought that "consent of the people" was a subjective criterion and could only lead to divergences of view and of action.³² The representative of Poland asserted that "the Organization could not ensure that a government exercised its authority with the consent of the people without intervening in the internal affairs of States."³³

The third and the fourth criteria proposed by Cuba gave rise to extensive debate in the Committee. Those who were against these criteria advanced the argument that a distinction must be made between the admission of a state to membership in the United Nations and the recognition of representation of a Member State in the United Nations. They claimed that the conditions laid down in Article 4 of the Charter regarding admission of Members could not be applied as a test for recognition of the representation of a state which had already been admitted to the United Nations; if the government of the state concerned should later prove to be unable and unwill-

²⁸ U. N. Doc. A/AC.38/22, Oct. 23, 1950. The Chinese amendment also proposed to add to par. 3 of the preamble of the Cuban draft resolution the following paragraph: "That the recognition of a new representative of a Member State should not be premature and should be guided strictly by the principles and provisions of the Charter of the United Nations and the Stimson Doctrine of Non-recognition." *Ibid.*

²⁹ General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, 19th meeting, p. 120.

³⁰ *Ibid.*, 20th meeting, p. 130.

³¹ U. N. Doc. A/AC.38/L.22, Oct. 23, 1950.

³² General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, 18th meeting, p. 154.

³³ *Ibid.*, 23rd meeting, p. 116.

ing to fulfill its obligations under the Charter or failing to observe human rights and fundamental freedoms, the state could then be expelled from the Organization in accordance with the provisions of Article 6 of the Charter.³⁴ On the other hand, the representatives who defended these criteria asserted that the Charter implied no distinction between the conditions required for the admission of a state to membership and those governing the collective recognition of a delegation from a Member State, that the purposes of the United Nations would not be furthered by ignoring the fact that a claimant for accreditation was unwilling and unable to carry out the obligations laid down in the Charter, and that if, under Article 6 of the Charter, a Member which had persistently violated the principles of the Charter could be expelled, then logically the Organization had the right not to recognize the representation of a government which was unable and unwilling to fulfill the obligations prescribed by the Charter.³⁵ Certain representatives thought that the fourth criterion was superfluous, since respect for human rights and fundamental freedoms was, under Article 1, paragraph 3, of the Charter, one of the Purposes of the United Nations and was therefore already covered by the third criterion.³⁶

2. *The United Kingdom Draft Resolution and Amendments Thereto*

Paragraph 1 of the operative part of the draft resolution submitted by the United Kingdom recommended:

where the question of the representation of a Member State arises in consequence of internal processes or changes which have taken place in the State, the right of a Government to represent the Member State concerned in the United Nations should be recognized if that Government exercises effective control and authority over all or nearly all the national territory, and has the obedience of the bulk of the population of that territory, in such a way that this control, authority and obedience appear to be of a permanent character.³⁷

³⁴ For statements to this effect made by the representatives of the members of the Committee, see General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, pp. 116 and 147 (United Kingdom), p. 122 (U.S.S.R.), p. 127 (India), p. 129 (Netherlands), p. 131 (Union of South Africa), p. 138 (Czechoslovakia), p. 141 (Burma), p. 145 (Chile), p. 151 (Poland), and p. 156 (Canada).

³⁵ For statements to this effect made by the representatives of the members of the Committee, see *ibid.*, pp. 113 and 148 (China), p. 115 (Uruguay), pp. 120 and 155 (U. S. A.), p. 139 (El Salvador), p. 146 (New Zealand), p. 148 (Cuba), and p. 155 (Ecuador). The amendments submitted by China to the Cuban draft resolution proposed to add at the end of subparagraph 1(c) of that resolution the words: "not having been an accomplice of aggression or given aid and sympathy to an aggressor so proclaimed by the United Nations; and not having committed acts of aggression," and at the end of subparagraph 1(d) the words: "as defined by the United Nations Universal Declaration of Human Rights." See U. N. Doc. A/AC.38/L.22.

³⁶ *Ibid.*, p. 115 (Uruguay) and p. 131 (Union of South Africa).

³⁷ U. N. Doc. A/AC.38/L.21, Oct. 20, 1950.

In the opinion of the representative of the United Kingdom, the question of who represented states was a question of fact and the draft resolution submitted by his delegation provided for the simple objective test which was available and already had the sanction of international law. He further explained that the test applied only to states of which the government had changed as a result of some internal development, while changes of government brought about through acts of aggression from outside were clearly not included. As to the permanent nature of such control and obedience, he conceded that "while it was not always easy to judge whether control would be permanent, that question was in most cases easier to answer than the question of consent by the people to control by a government."³⁸

The United Kingdom proposal also met with both approval and criticism by the various representatives.³⁹ While some of them acknowledged that it provided undeniable objective tests in the matter of recognition of representation of a Member State, others pointed out that neither the criteria suggested by Cuba, nor those by the United Kingdom, were objective. Thus, it was contended that since it was for each government to decide whether it believed in the permanent character of control, authority and obedience enjoyed by a new government, the criterion of permanent character was a subjective one. In this connection, the question was also raised whether a situation could be regarded as permanent if it simply appeared to be so. Moreover, it was thought that the terms "national territory," "nearly all the national territory," and "the bulk of the population" were not always easy to define. As to the obedience of the people to authority, it was contended that a government might achieve control over a country by subversion and violence and that obedience might mean consent under duress.

In addition to these comments, an amendment was introduced by Venezuela, proposing to add at the end of paragraph 1 of the United Kingdom draft resolution the words: "and expressly declares its willingness to fulfill the international obligations of the State."⁴⁰

3. *The Subcommittee's Draft Resolution and Amendments Thereto*

The draft resolution adopted by the subcommittee and presented to the Ad Hoc Political Committee for consideration, recommended in paragraph 1:

³⁸ General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, 18th meeting, p. 117.

³⁹ For the opinions expressed in the Committee concerning the criteria contained in the United Kingdom draft resolution, see *ibid.*, p. 117 (United Kingdom), pp. 123 and 148 (China), p. 128 (Bolivia), p. 129 (Netherlands), p. 131 (Union of South Africa), p. 132 (Israel), p. 138 (Norway), p. 140 (Venezuela), p. 142 (Greece), p. 143 (Byelorussian S.S.R.), p. 144 (Yugoslavia), p. 145 (Chile), and p. 146 (New Zealand).

⁴⁰ U. N. Doc. A/AC.38/L.24, Oct. 25, 1950.

(a) that whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations, and this question becomes the subject of controversy in the United Nations, it should be considered in the light of the purposes and principles of the Charter and the circumstances of each case;

(b) that the following should be among the factors to be taken into consideration in determining any such question:

- (i) the extent to which the new authority exercises effective control over the territory of the Member State concerned and is generally accepted by the population;
- (ii) the willingness of that authority to accept responsibility for the carrying out by the Member State of its obligations under the Charter;
- (iii) the extent to which that authority has been established through internal processes in the Member State.⁴¹

The majority of the Ad Hoc Political Committee considered subparagraph 1(a) of the draft resolution to be acceptable. But opinions expressed in the Committee reflected serious objections to subparagraph 1(b). The grounds on which such objections were based may be summarized⁴² as follows:

(1) That the extent of control by the new authority and its general acceptance by the population were a subjective factor, the determination of which would amount to an intervention in matters essentially within the domestic jurisdiction of a state;

(2) That the test of the acceptance of responsibility by the new authority for the carrying out of its obligations under the Charter was unacceptable because it confused the issue of admission of a state to membership with that of recognition of the representation of a Member State;⁴³

(3) That the "extent to which that authority has been established through internal processes in the Member States" was too vague and was open to divergent interpretations;⁴⁴ and

⁴¹ U. N. Doc. A/AC.38/L.45, Nov. 21, 1950.

⁴² General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, 57th to 60th meetings, Nov. 27-28, 1950.

⁴³ The report of the subcommittee, in order to express the attitude of some delegations, included in par. 16 the following note: "In ordinary circumstances, the declaration by a new government of its willingness to accept responsibility for carrying out the obligations of the Charter will be sufficient. However, the conduct of the new government may be considered when such conduct refutes the consideration and reveals that it has not been made in good faith." U. N. Doc. A/AC.48/L.45, p. 5. The representative of the United Kingdom concurred in the view that a mere declaration by the new government to respect its obligations under the Charter was sufficient compliance with the requirements of item (ii) of subparagraph 1(b). See General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, 58th meeting, p. 373.

⁴⁴ The representative of France stated that while delegations were inclined to interpret "through internal processes" as meaning "free from outside intervention," in

(4) That the enumeration was not exhaustive since the three factors contained in subparagraph 1(b) were "among the factors to be taken into consideration"; hence every Member State was free to add other criteria, thus further increasing the confusion.

In view of the fact that subparagraph 1(b) had met with most opposition, the Egyptian Delegation offered an amendment for its deletion.⁴⁵ The subcommittee's draft resolution as amended by the Egyptian amendment was adopted.⁴⁶ Thus, the attempts to establish precise and specific legal criteria for the recognition by the United Nations of the representation of a Member State failed. The General Assembly was content with the adoption of a general and flexible principle allowing it to base its consideration of the question on the Purposes and Principles of the Charter and the circumstances of each case.⁴⁷

III. OTHER PROBLEMS CONNECTED WITH THE QUESTION OF RECOGNITION OF REPRESENTATION OF A MEMBER STATE

1. *Proposals to Refer the Question to Juridical Bodies*

When the item proposed by Cuba was discussed in the General Committee of the General Assembly, opinion was divided as to whether it was a political question and should be referred to the Ad Hoc Political Committee for discussion, or a legal question and should be considered by the Sixth (Legal) Committee. The representative of Cuba suggested that the item might come before the Sixth Committee at a later stage in its discussion. It was on this understanding that the General Committee agreed to refer the item to the Ad Hoc Political Committee.⁴⁸

During the general debate in the Ad Hoc Political Committee, some representatives contended that the question of recognition of representation had both legal and political aspects; some others maintained that the question was fundamentally legal in character but had at the present juncture become a very important political problem, the legal aspects being in the background; still others thought that it was essentially a political problem.

borderline cases it could become very controversial. See *ibid.*, 59th meeting, pp. 379-380.

⁴⁵ U. N. Doc. A/AC.38/L.54, Nov. 28, 1950. An amendment submitted by the Argentine Delegation (U. N. Doc. A/AC.38/L.56) to substitute another version for par. 1 of the subcommittee's draft resolution was later withdrawn because of lack of support.

⁴⁶ General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, 60th meeting, p. 388.

⁴⁷ This principle was criticized by the representatives of Poland and Czechoslovakia on the ground that it placed the circumstances of each case on the same footing as the principles of the Charter, despite the fact that the Charter should prevail. *Ibid.*, pp. 369, 378.

⁴⁸ General Assembly, 5th Sess., Official Records, General Committee, 70th meeting, Sept. 22, 1950, p. 10.

There were also different suggestions with respect to the appropriate organ which should be asked to study the legal aspects of the question. The International Court of Justice, the Sixth Committee, the International Law Commission, and the Secretariat of the United Nations were among the organs mentioned. Those who considered the political aspects of the problem as predominant thought that the Ad Hoc Political Committee and ultimately the General Assembly could reach a decision without the assistance of a legal organ.

At the twentieth meeting of the Ad Hoc Political Committee, the Dominican Republic submitted a draft resolution to the effect that the International Law Commission should be requested to study the legal aspects of the item and to submit the results of its study in time for inclusion in the agenda of the sixth regular session of the General Assembly, to be held in November, 1951.⁴⁹ "In the interim period," explained the representative of the Dominican Republic, "there was nothing to prevent the establishment of a Sub-Committee or joint meetings of the Ad Hoc Political Committee with the Sixth Committee to deal with the question."⁵⁰ The representative of the United Kingdom indicated that if the Committee should decide to refer the legal points to the International Court of Justice, which was regarded as the most appropriate organ by his government, or to the International Law Commission as suggested by the Dominican Republic, then concrete questions should be submitted to such bodies. Accordingly, the United Kingdom formulated two specific questions, embodying the criteria proposed in its draft resolution, to be put to the Court or the Commission.⁵¹

In the course of discussion in the Ad Hoc Political Committee of the subcommittee's report and draft resolution, the Dominican Republic submitted another draft resolution:

to request the International Law Commission of the United Nations to study the legal aspects of the item "Recognition by the United Nations of the Representation of a Member State" and, in connection with the problem of such representation, the following principal factors:

(a) the extent to which the new authority exercises control over the territory of the Member State in question and to which it is generally accepted by the population;

(b) the ability and will to accept and carry out the obligations which the Charter imposes upon it as a Member State; the scope of a declaration made by a new Government of its willingness to accept responsibility for carrying out the obligations of the Charter and the implications which would arise in cases where the conduct of the new Government is not in conformity with the said declaration or has not been made in good faith;

⁴⁹ U. N. Doc. A/AC.38/L.23, Oct. 23, 1950.

⁵⁰ General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, 22nd meeting, p. 147.

⁵¹ U. N. Doc. A/AC.38/L.25, Oct. 26, 1950.

(c) the consideration of the various internal processes which may contribute to a change in the representation of a Member State in the United Nations, and the extent to which the authority has been established as a result of such processes;

(d) the implication of external processes in the constitution of new authorities which request representation of the Government of the Member State in the United Nations.⁵²

The idea of referring the legal aspects of the question to the International Law Commission was favored by certain delegations and opposed by others. After the subcommittee's draft resolution as a whole, as amended, was adopted by the Ad Hoc Political Committee, the Delegation of the Dominican Republic withdrew its draft resolution.⁵³

2. Designation of Competent Organ to Deal with the Issue of Recognition of Representation

Both the Cuban draft resolution and the United Kingdom draft resolution considered that the General Assembly, in virtue of its composition, was the only organ of the United Nations in which consideration could be given to the views of all Member States in matters affecting the functioning of the Organization as a whole. It was therefore proposed that the task of dealing with the question of representation of a Member State in the United Nations should be entrusted to the General Assembly.⁵⁴

The question was raised as to what should be done in the case of a question of representation arising while the General Assembly was not in session. Upon a suggestion of the Dominican Republic, the subcommittee recommended, in paragraph 2 of its draft resolution, that in such a case, the matter should be considered by the Interim Committee of the General Assembly.⁵⁵ This provision was supported by the representative of the United States, who pointed out that it was not intended to have any other effect than to ensure proper consideration of a question which would normally have to be considered by the General Assembly in any event.⁵⁶ The representative of the Soviet Union, supported by the representatives of Poland and Byelorussia, alleged that the proposal "illegally extended the rights

⁵² U. N. Doc. A/AC.38/L.55, Nov. 28, 1950.

⁵³ General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, 60th meeting, p. 387.

⁵⁴ U. N. Docs. A/AC.38/L.6 and A/AC.38/L.21. The U. K. draft resolution further proposed that consideration of the question by the General Assembly should not preclude "action by any other organ of the United Nations which is called upon to take a decision on the matter during the period before the Assembly meets." This provision was not contained in the revised draft resolution submitted by the U. K. at a later date. See U. N. Docs. A/AC.38/L.21/Rev.1, Oct. 31, 1950, and A/1578/Add.1, Dec. 13, 1950.

⁵⁵ U. N. Doc. A/AC.38/L.45, Nov. 21, 1950, p. 4.

⁵⁶ General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, 57th meeting, p. 365.

and competence of the General Assembly and of the Interim Committee—an illegal organ—in order to enable them to interfere in the internal affairs of Member States.”⁵⁷ The reference to the Interim Committee was also opposed by the representative of India on the grounds that by virtue of the third paragraph of the preamble of the draft resolution, the General Assembly itself, not the Interim Committee, should decide on the representation of a Member State. “Furthermore,” he said, “no mention was made of the Interim Committee in the Charter, and that organ could not be regarded as representing all the Members of the United Nations.”⁵⁸ A formal amendment was submitted by Belgium⁵⁹ for the deletion of paragraph 2 of the subcommittee’s draft resolution. In explaining his amendment, the representative of Belgium said:

That paragraph was superfluous and dangerous. It was superfluous because its general intention was already covered by paragraph 3, which allowed the General Assembly, or failing that, the Interim Committee, to take up the matter in case of need. It was dangerous because in a way it was an encouragement to those bodies to take up the question.⁶⁰

Although the paragraph in question was deleted by the Ad Hoc Political Committee, it was reintroduced by an Egyptian amendment⁶¹ which was adopted by the General Assembly at a plenary session.⁶²

3. *Effects of the Decision of a Competent Organ*

A. EFFECT ON THE RELATIONS BETWEEN INDIVIDUAL MEMBER STATES AND THE STATE CONCERNED

The memorandum submitted by the Secretary General on the legal aspects of the question of representation in the United Nations argued that the linking up of the question of representation with the question of recognition by Member Governments was “unfortunate from the practical standpoint and wrong from the standpoint of legal theory.”⁶³ Having cited the practice in both the League of Nations and in the United Nations to indicate

⁵⁷ *Ibid.*, 60th meeting, p. 384. The Soviet Union and the states which supported the Soviet position had consistently maintained that each organ of the United Nations should apply its own rules of procedure to decide on the question of representation of a Member State, should such a question arise.

⁵⁸ *Ibid.*, 60th meeting, p. 386; see also U. N. Doc. A/AC.38/L.58, Nov. 29, 1950.

⁵⁹ U. N. Doc. A/AC.38/L.50, Nov. 27, 1950.

⁶⁰ General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, 57th meeting, p. 367.

⁶¹ U. N. Doc. A/1582, Dec. 1, 1950.

⁶² General Assembly, 5th Sess., Official Records, Plenary Meetings, 325th meeting, p. 675. See also U. N. Doc. A/1753, Dec. 18, 1950.

⁶³ U. N. Doc. S/1466, March 9, 1950, p. 2.

that the admission of Members was independent of the recognition of states, the memorandum stated:

The practice as regards representation of Member States in the United Nations organs has, until the Chinese question arose, been uniformly to the effect that representation is distinctly separate from the issue of recognition of a government. It is a remarkable fact that, despite the fairly large number of revolutionary changes of government and the larger number of instances of breach of diplomatic relations among Members, *there was not one single instance of a challenge of credentials of a representative* in the many thousands of meetings which were held during four years. On the contrary, whenever the reports of credentials committees were voted on (as in the sessions of the General Assembly), they were always adopted unanimously and without reservation by any Members.

The Members have therefore made clear by an unbroken practice that (1) a Member could properly vote to accept a representative of a government which it did not recognize, or with which it had no diplomatic relations, and (2) that such a vote did not imply recognition or a readiness to assume diplomatic relations.⁶⁴

The Cuban draft resolution, the United Kingdom draft resolution, and subsequently the subcommittee's draft resolution all contained a provision, though slightly different in wording, to the effect that decisions reached by the General Assembly of the United Nations concerning the question of representation should not affect the direct relations of individual Member States with the state the representation of which has been the subject of such decisions.⁶⁵ Except for the substitution of the words "attitude adopted" for the words "decisions reached," and a few drafting changes, this provision was endorsed by the General Assembly. In the course of discussion, a large majority of the delegations approved this principle, while certain delegations expressed the view that the question of representation in the United Nations and the question of individual recognition by Member States were in substance interconnected or that such direct relations would in practice be affected by the decision of the General Assembly.⁶⁶

⁶⁴ *Ibid.*, p. 5.

⁶⁵ See U. N. Docs. A/AC.38/L.6 (par. 3), A/AC.38/L.21 (par. 4), and A/AC.38/L.45 (p. 4).

⁶⁶ General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, pp. 121, 373. Secretary of State Dean Acheson, testifying before the United States Senate Investigation Committee, and referring to the question of recognition of the Chinese Communist government and the question of its entry into the United Nations, stated: "One is the question of recognition by this Government of some government as the government of the particular country. The other one has to do with the admission into the United Nations of a government. In one we can determine whom we recognize. We are part of a larger organization which determines what government can represent a country in the United Nations." U. S. Senate, 82nd Cong., 1st Sess., Hearings before the Committee on Armed Services and the Committee on Foreign Relations on the Military Situation in the Far East, Part 3, June 1-13, 1951, pp. 1819-1820.

B. EFFECT ON THE OTHER ORGANS OF THE UNITED NATIONS AND THE
SPECIALIZED AGENCIES

Paragraph 3 of the United Kingdom draft resolution recommended that "the view taken by the General Assembly concerning the right of a government to represent a Member State should be acted upon by Member States in other organs of the United Nations and in specialized agencies."⁶⁷ The representative of Israel expressed doubts whether such a provision might not give rise to difficulty by reason of the divergent objectives and constitutional provisions of the specialized agencies and their agreements with the United Nations.⁶⁸ The representative of the United States remarked that the criteria concerning representation adopted by the General Assembly "would be binding only upon the Assembly itself and its subsidiary organs, and would serve as a recommendation to the other organs of the United Nations until such time as those organs adopted criteria of their own."⁶⁹

Having considered these views expressed in the Ad Hoc Political Committee, the subcommittee recommended that

the decision reached by the General Assembly or its Interim Committee concerning any such question should be taken into account in other organs of the United Nations and in the specialized agencies.⁷⁰

In the subcommittee, it was suggested that the word "decision" did not imply that the action taken by the General Assembly would be binding on all other organs or on the specialized agencies.⁷¹ The suggestion that the conclusions of the General Assembly, when considered in relation to other United Nations organs, did not have the force of decisions, was again discussed in the Ad Hoc Political Committee.⁷² The Committee finally adopted a Belgian amendment⁷³ to substitute the words "attitude adopted" for the words "decisions reached."

Although the question of Chinese representation *in concreto* was not referred to in the debates on the Cuban proposal in the Ad Hoc Political Committee and in the General Assembly, there was no doubt that this ques-

⁶⁷ U. N. Doc. A/AC.38/L.21, Oct. 20, 1950. A revised draft resolution submitted by the U. K. provided in par. 2 of its operative part that "the principle set out in the preceding paragraph should be applied by Member States in other organs of the United Nations and in the specialized agencies when taking a decision concerning the representation of any State a Member of the United Nations or of the specialized agencies concerned." U. N. Doc. A/AC.38/L.21/Rev.1, Oct. 31, 1950.

⁶⁸ General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, 20th meeting, p. 133.

⁶⁹ *Ibid.*, 19th meeting, p. 120; 23rd meeting, p. 155.

⁷⁰ U. N. Doc. A/AC.38/L.45, p. 4.

⁷¹ *Ibid.*, p. 6.

⁷² General Assembly, 5th Sess., Official Records, Ad Hoc Political Committee, 58th meeting, p. 374.

⁷³ See U. N. Doc. A/1578, Dec. 1, 1950, p. 9.

tion led to the consideration by the General Assembly of the general problem of the recognition of the representation of a Member State and was apparently uppermost in the minds of most of the representatives who made statements on the problem. Also, the resolution (396(V)) adopted by the General Assembly as a result of the Cuban proposal has not been without repercussion on other organs of the United Nations and on specialized agencies in their consideration of the question of Chinese representation. Therefore, as a conclusion to this note, it may be useful to summarize in general terms the decisions of the organs of the United Nations and the specialized agencies on the question of Chinese representation both before and after the adoption of the above-mentioned resolution of the General Assembly.

(1) Previous to the consideration by the General Assembly of the general problem of representation, all proposals to challenge the representation of China by the National Government failed of adoption in the organs of the United Nations. This was also true in all the specialized agencies except the Universal Postal Union. The Executive Committee of this specialized agency, at its fourth session in May, 1950, voted to admit the representative of the People's Republic of China to its meetings. The Executive Committee, however, also decided to consult by referendum the various Postal Administrations of the Union on the question of the representation of China in the Union. At the fifth session of the Executive Committee, held in May, 1951, the following result of the referendum was announced: 37 voted for recognition of the representative of Nationalist China, 23 against, and 14 abstained. The Executive Committee accordingly decided, by 10 votes to 6, with 3 abstentions, to admit the representative of the Chinese National Government, thus reversing its decision of the previous session.⁷⁴

(2) At the beginning of its fifth regular session, the General Assembly adopted a resolution to establish a special committee, consisting of seven members, "to consider the question of Chinese representation and to report back, with recommendations, to the present session of the General Assembly, after the Assembly shall have considered item 62 of the provisional agenda" (item proposed by Cuba).⁷⁵ The special committee on October 16, 1951, authorized its chairman to inform the General Assembly that in the present circumstances it was unable to make any recommendation on this question.

(3) Since the adoption by the General Assembly of the resolution (396(V)) and up to the end of May, 1951, the various organs of the United Nations, when confronted with the question of representation of China,

⁷⁴ *Commission exécutive et de liaison de l'Union Postale Universelle: Comptes rendus analytiques de la 4ème session*, pp. 6 and 7, *et de la 5ème session*, pp. 6 and 7.

⁷⁵ General Assembly Resolution 490(V), Sept. 19, 1950. This resolution further provided that "pending a decision by the General Assembly on the report of this Special Committee, the representatives of the National Government of China shall be seated in the General Assembly with the same rights as other representatives."

either took account of the General Assembly resolution and decided to postpone discussion of the question, or considered themselves not competent, as functional or subsidiary organs, to make a decision thereon.⁷⁶

⁷⁶ Trusteeship Council, 8th Sess., Official Records, 315th meeting, Jan. 30, 1951, pp. 1-6; Economic and Social Council, 12th Sess., Official Records, 437th meeting, Feb. 20, 1951, pp. 1-3; Ad Hoc Committee on the Organization and Operation of the Economic and Social Council and its Commissions, Doc. E/AC.34/SR.1, 1st meeting, Jan. 4, 1951, pp. 2-3; Economic Commission for Asia and the Far East, 7th Sess., Doc. E/CN.11/SR.79, 79th meeting, Feb. 28, 1951, pp. 2-8; Transport and Communications Commission, 5th Sess., Doc. E/CN.2/SR.45, 45th meeting, March 19, 1951, pp. 2-5; Social Commission, 7th Sess., Doc. E/CN.5/SR.147, 147th meeting, March 19, 1951, pp. 4-6; Commission on Narcotic Drugs, 6th Sess., Doc. E/CN.7/SR.122, 122nd meeting, April 10, 1951, pp. 2-3; Commission on Human Rights, 7th Sess., Doc. E/CN.4/SR.202, 202nd meeting, April 16, 1951, pp. 4-7; Population Commission, 6th Sess., Doc. E/CN.9/SR.63, 63rd meeting, April 23, 1951, pp. 2-4; Commission on the Status of Women, 5th Sess., Doc. E/CN.6/SR.82, 82nd meeting, April 30, 1951, pp. 3-5; Statistical Commission, 6th Sess., Doc. E/CN.3/SR.66, 66th meeting, May 7, 1951, pp. 4-5; Fiscal Commission, 3rd Sess., Doc. E/CN.8/SR.11, May 7, 1951, pp. 3-4.

EDITORIAL COMMENT

IN MEMORIAM: EDWIN M. BORCHARD, 1884-1951

Edwin M. Borchard, lawyer, scholar, teacher, public servant, and kindly humanitarian, died July 22, 1951, after a lingering illness. Born in New York, October 17, 1884, he received his LL.B. at New York Law School in 1905 and a Ph.D. at Columbia University in 1913. He was awarded honorary degrees of Doctor of Laws by the University of Berlin in 1925 and by the University of Budapest in 1935. He served as expert on international law to the American Agency, North Atlantic Coast Fisheries Arbitration at The Hague in 1910; as Law Librarian of Congress from 1911 to 1913 and from 1914 to 1916; as Assistant Solicitor, Department of State, 1913-1914; as chief counsel for Peru in the Tacna-Arica Arbitration; as special legal adviser to the Treasury Department; as technical adviser to the American Delegation to The Hague Codification Conference of 1930; and as a member of the Pan American Committee of Experts for the Codification of International Law.

In 1917 Mr. Borchard became Professor of Law on the faculty of the Yale University Law School, where he taught international law to a generation of students and produced some distinguished disciples.

Professor Borchard was an able and productive scholar. His monumental study of *The Diplomatic Protection of Citizens Abroad*, published in 1915, remains without peer in the literature of international law. In the same field, his mastery of the subject was demonstrated in his preparatory studies for the draft of the *Institut de Droit International* and in the comment of the Harvard Research in International Law Draft on the Responsibility of States for Injuries to Aliens, and in numerous articles in legal periodicals. A member of the Board of Editors of this JOURNAL from 1924 until his death, Mr. Borchard enriched and enlivened its pages for a quarter of a century with sound scholarship and incisive comment.

In addition to his other duties, Mr. Borchard found time to compile *Coastal Waters* (1910); *Guide to Law and Legal Literature of Germany* (1911); *Bibliography of International Law and Continental Law* (1913); *Commercial Laws of England, Scotland, Germany and France* (with A. J. Wolfe, 1915); *Guide to Law and Legal Literature of Argentina, Brazil and Chile* (1917); and *Latin-American Commercial Law* (with T. Esquivel Obrégon, 1920). In 1917 Mr. Borchard translated and edited Fiore's *International Law Codified*.

Following his life-long friend and mentor, John Bassett Moore, Mr. Borchard became a strong partisan of neutrality for the United States prior to

both World Wars. In 1937 (new edition with W. P. Lage in 1940) he published an incisive analysis of legal and political aspects of the problem under the title, *Neutrality for the United States*. So imbued did he become with the idea that the United States had taken the wrong path in the two World Wars and their aftermath that he tended to become polemical against the participation of the United States in efforts at collective security, and profoundly skeptical of general international organizations.

Professor Borchard's professional interests were not confined to international law. With a zealous humanitarian interest in legal reform, he published *Declaratory Judgments* in 1918 and his influential book, *Convicting the Innocent* in 1932. As a result he was instrumental in drafting the Declaratory Judgments Act, the Tort Liability Act, and the State Indemnity for Innocents Act in United States law.

For more than a quarter of a century, Professor Borchard was an active and stimulating participant in the affairs of the American Society of International Law. His recognized erudition, his willingness to tilt a lance for causes he held dear, and his kindly interest in younger scholars won him the affectionate regards of a host of friends. A great legal scholar and a warmly humane man has passed from our midst.

HERBERT W. BRIGGS

NATIONALIZATION OF FOREIGN-OWNED PROPERTY IN ITS IMPACT ON INTERNATIONAL LAW

The nationalization of foreign-owned property presents problems which put a severe strain upon some of the accepted principles of international law. Chandler Anderson, one of the founding members of the American Society of International Law, pointed out nearly a quarter of a century ago that the principle which safeguards foreign-owned property from confiscation in time of peace "has become a part of the law of nations not merely because it represents a universally recognized standard of justice, but also because it is absolutely essential for the welfare of every nation, for without its protection no commercial, or financial international intercourse could safely be carried on."¹ Since that time, the practice of expropriating foreign property by "nationalization" has spread from Soviet Russia to other countries constituting important parts of the free world strongly opposed to Communism.

The most recent case of nationalization has brought about the tension between Great Britain and Iran because of the nationalization of the property of the Anglo-Iranian Oil Company. This has introduced some new phases of the problem, because the property seized was not owned by private interests alone but by a corporation, the majority of the stock of which

¹ C. P. Anderson, "Bases of the Law against Confiscating Foreign-owned Property," this JOURNAL, Vol. 21 (1927) p. 526.

is owned by the British Government, a government which itself had already entered upon the nationalization of certain of its own industries. Furthermore, the immense quantities of oil which are recovered, refined and transhipped by the Anglo-Iranian Oil Company constitute an appreciable percentage of the world's production of an essential commodity on which many countries besides those directly interested are dependent.²

The principle of the extent of protection to be accorded to foreign-owned property has never had any precise definition on which all nations are agreed. What is called the international standard of justice is at best a variable measure. Even though a constant formula were forthcoming, the realities of the modern industrial world would make it impossible in many cases to carry out the principle of full compensation. Prosperous nations do not ordinarily find it either wise or expedient to enter upon a policy of nationalization. The principle of just compensation gives way to considerations of the debtor's political instability or its capacity to pay. This was recognized by the United States in the negotiation of the settlement of the claims of United State citizens against the Federal People's Republic of Yugoslavia by the agreement of July 19, 1948, under which the sum of seventeen million dollars was accepted as a lump sum for property nationalized, although the market value was much greater. The International Claims Settlement Act of March 10, 1950, set up an International Claims Commission with power to examine, adjudicate and render final decision with respect to claims of the Government of the United States or of its nationals, not only under the terms of the agreement with Yugoslavia, but also under the terms of any agreement thereafter concluded with other governments (excepting those at war with the United States in World War II) arising out of the nationalization or other taking of property, where the Government of the United States has agreed to accept from that government a sum in *en bloc* settlement thereof.³

The language of this statute seems to envisage a notable change in diplomatic protection from one accorded to separate individual claims to that of a single governmental claim made on behalf of all nationals whose property has been nationalized. Where there has been an *en bloc* settlement, proceedings must be taken by each claimant before a commission authorized to hear and determine the claims. Under such a proceeding, no settlement can be made with any until all the claims have been determined; otherwise the amount of ademption cannot be ascertained to which each claimant must submit in a settlement less than the full amount.⁴

Foreign investors are now faced with an added risk, and if the resources

² For I.C.J. proceedings in this case, see below, p. 789.

³ Laws of 81st Cong., 2nd Sess., Ch. 54, Public Law 455, Sec. 4 (a); this JOURNAL, Supp., Vol. 45 (1951), p. 58.

⁴ R. L. Bindschedler, *Verstaatlichungs Massnahmen und Entschädigungspflicht nach Völkerrecht* (Zürich, 1950), p. 89.

of the world are to be developed by foreign risk-capital under a Point-Four Program or otherwise, a better basis than that now provided against the danger of nationalization must be established. Some supplementary principles of a political and economic nature must be developed to bring the undisputed rules of international law within the realities of international life. At the annual meeting of the Standard Oil Company (New Jersey) on June 8, 1951, President Eugene Holman gave an outline of what he conceived to be such a basis for the oil industry. He said that the oil companies producing oil in foreign lands recognize that the oil underground belongs to the people of those lands and that a foreign government which lets oil concessions may rightfully expect: (1) that an adequate participation in the proceeds should accrue to the government; (2) that operations shall be so conducted as to contribute to the domestic economy of the nation; (3) that domestic demands for oil be fully satisfied before any oil is exported; (4) that there be no avoidable waste of the natural resources; (5) that the enterprise give training and employment to local citizens at fair rates of compensation; and (6) that oil and oil products available for export move to markets in fair volume at fair prices. On the other side, the foreign government should assure continuously for the period of the concession (1) security of title to the property or rights conceded; (2) managerial control of the company's operations; and (3) the opportunity to make a reasonable profit from the enterprise.⁵

At the meeting of the *Institut de Droit International* at Bath, England, in August, 1950, Professor A. de La Pradelle presented the report of a committee dealing with "International Effects of Nationalizations." Unfortunately, time did not permit even a preliminary discussion of the report, and accordingly it is mentioned here only to indicate that jurists are beginning to take account of the problems involved with a view to some definition of the impact which nationalizations are having upon international law. The Chairman accompanied his report by a draft resolution of some twenty-two articles setting forth the principles of international law applicable to nationalizations, in which it is recognized that aliens are entitled to international treatment in the event of nationalization of property, even though this treatment is superior to that accorded to nationals.

We believe that eventually some regulation will be achieved either by non-governmental agencies or under the auspices of the United Nations for a compromise between the demands of national sovereignty and the international protection of foreign property in time of peace. If nationalization laws introduced as social reforms were to recognize full, adequate and prompt compensation, none could be carried out.⁶ A compromise in the

⁵ Printed proceedings of the Annual Meeting, Standard Oil Co. (N. J.) (published by the company July 9, 1951), p. 4.

⁶ See N. R. Doman, "Postwar Nationalization of Foreign Property in Europe," *Columbia Law Review*, December, 1948, pp. 1123, 1161.

method of compensation is not a compromise in the principles of international law; on the other hand, nationalization should never be permitted or recognized if the compensation provided for is so inadequate as to constitute merely a disguise for the spoliation of foreign-owned property.

ARTHUR K. KUHN

THE NEED FOR A JAPANESE FISHERIES AGREEMENT

The near approach of peace with Japan necessitates careful consideration and prompt action with respect to Pacific Ocean fisheries relations.¹ The peace treaty with Japan provides in Article 9:

Japan will enter promptly into negotiations with the Allied Powers so desiring for the conclusion of bilateral and multilateral agreements providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas.²

¹ Many groups, particularly on the Pacific coast, urge that action should be taken at once, or should have been taken already. For example, the General Conference of the Pacific Northwest Trade Association adopted April 17-18, 1950, a resolution "that no peace treaty should be entered into with Japan by either Canada or the United States until and unless definite and binding commitments are made by Japan which will adequately protect the interests of Canada and the United States in their coastal fisheries not only within but beyond territorial waters." The Pacific Fisheries Conference resolved on Nov. 29, 1950, "that in the treaty of peace with Japan, or in a separate treaty to be concluded prior to or at the same time, suitable treaty provisions be made which will ensure that Japanese fishermen will stay out of the fisheries of the Northeast Pacific Ocean which have been developed and husbanded by the United States and the other countries of North America." See also Report of the Committee on Fisheries and Territorial Waters, 1950 Proceedings of the Section of International and Comparative Law, American Bar Association, p. 37; E. W. Allen, "International Aspects of Fishery Conservation," *Pacific Northwest Industry*, June, 1950, p. 160.

² Department of State Bulletin, Vol. 25, No. 635 (Aug. 27, 1951), p. 350. In his address, "Essentials of a Peace with Japan," on March 31, 1951, at Whittier College (Department of State Publication 4171, p. 8), Ambassador J. F. Dulles pointed out that attempting to cover the problems of Japanese participation in high seas fisheries in the peace treaty itself, rather than in separate agreements between Japan and the country or countries concerned in each fishery, "would almost surely postpone indefinitely both the conclusion of peace and the obtaining of the results which are desired." He added, "There is, I believe, a considerable possibility of agreement between the United States and Japanese fishing interests. . . . No quick results can be won by attempting to make the peace treaty into a universal convention on high-seas fishing. . . . The Japanese now see the importance of avoiding practices which in the past brought Japan much ill will, and, if we can hold to our tentative timetable, there can, I believe, be an early and equitable settlement of this thorny problem."

On the other hand, at the recent San Francisco Conference the Indonesian and Netherlands representatives expressed the view that the treaty should have established greater safeguards against Japanese fishing in high seas areas off Indonesia and Dutch New Guinea. *The New York Times*, Sept. 7, 1951, p. 7, col. 5; *ibid.*, Sept. 8, 1951, p. 4, col. 3 and p. 5, col. 7.

Previously, in a note of February 7, 1951, to Ambassador Dulles, Prime Minister Yoshida of Japan had stated:

... We are aware of the fact that certain countries have adopted international agreements and voluntary self-denying ordinances to prevent the exhaustion of high seas fisheries which are readily accessible to fishermen of their own country, and that if these conserved fisheries were to be subjected to uncontrolled fishing from other countries, the result would be international friction and the exhaustion of the fisheries themselves.

Accordingly, the Japanese Government will, as soon as practicable after the restoration to it of full sovereignty, be prepared to enter into negotiations with other countries with a view to establishing equitable arrangements for the development and conservation of fisheries which are accessible to the nationals of Japan and such other countries.

In the meantime, the Japanese Government will, as a voluntary act, implying no waiver of their international rights, prohibit their resident nationals and vessels from carrying on fishing operations in presently conserved fisheries in all waters where arrangements have already been made, either by international or domestic act, to protect the fisheries from overharvesting, and in which fisheries Japanese nationals or vessels were not in the year 1940 conducting operations. Among such fisheries would be the salmon, halibut, herring, sardine and tuna fisheries in the waters of the eastern Pacific Ocean and Bering Sea.³

The present need is for speedy and effective implementation of these provisions along lines which will promote both the conservation and prudent utilization of the fisheries resources of the Pacific and the maintenance of friendly relations between Japan and her former enemies. All must be aware of the extent to which fisheries problems complicated these relations in the years prior to Pearl Harbor. Not only did Japan terminate (in 1941) the Treaty of 1911 with the United States, Great Britain, and Russia for the Protection of Fur Seals,⁴ and refuse to take part in any of the worldwide agreements for the regulation of whaling,⁵ but bitter controversies

³ Department of State Bulletin, Vol. 24, No. 608 (Feb. 26, 1951), p. 351.

⁴ 37 Stat. 1542; this JOURNAL, Supp., Vol. 5 (1911), p. 267. See Hackworth's Digest of International Law, Vol. 1, pp. 792-798; S. S. Hayden, International Protection of Wild Life (1942), pp. 114-136; L. Leonard, International Regulation of Fisheries (1944), pp. 55-95. On the Japanese termination, see Department of State Bulletin, Vol. 5 (1941), p. 336. The United States and Canada continued protection of fur seals under a provisional agreement of Dec. 8 and 19, 1942, 58 Stat. 1379, Ex. Agr. Ser. 415, which was modified Dec. 26, 1947, Treaties and Other International Acts Series, No. 1686. Pending such time as a new treaty may be worked out between the United States, Canada, Japan, and the Soviet Union, it would appear to be desirable for the United States and Canada to obtain from Japan an acceptance of the principles of the provisional agreement, at least to the extent that pelagic sealing would be forbidden to Japanese nationals and vessels. Such an agreement should not be too difficult to negotiate.

⁵ Cf. L. Leonard, *op. cit.*, pp. 98-109; *idem*, "Recent Negotiations toward the International Regulation of Whaling," this JOURNAL, Vol. 35 (1941), p. 90.

arose in 1936-38 over what was looked upon as a "Japanese invasion" of the salmon fisheries off Alaska, centering in the Bristol Bay area.⁶ Up and down the Pacific coast of North America there were fear and suspicion of what Japanese fishing vessels might do to destroy the carefully protected fisheries in high seas areas adjacent to the coast and to wipe out the flourishing fishing industry dependent on these resources. During the Allied occupation Japanese high seas fishing activities have been regulated in such fashion that these difficulties have not recurred.⁷ With the relaxation of such controls and the termination of the occupation, however, it becomes necessary for the United States and Japan (and likewise for Canada and Japan, and perhaps other fishing nations on the west coast of the Americas) to work out arrangements for the future. There is no need here to spell out the past experiences which make it clear that there will once again be a real danger of friction and ill will unless action is taken.

As a barest minimum, it would seem that Japan should and would be willing to enter into treaties with the United States and other west coast American countries under which Japanese nationals and vessels would be required to conform to the conservation regimes laid down by the nations whose vessels have been engaged in these fisheries. For example, Japanese vessels and nationals should be required to conform to the international whaling agreements (it is understood that Japan is about to become a party to the 1946 Whaling Convention⁸), and to refrain from pelagic sealing upon herds which migrate to Bering Sea. If Japan should under any circumstances be permitted to participate in fisheries off the west coast of America which have been subject to conservation by American nations, then it should be expected to obey the strict rules which the United States and Canada have so successfully applied in their efforts to conserve and rebuild the stock of Pacific halibut and sockeye salmon.⁹ Likewise, if permitted to

⁶ This controversy is reviewed briefly in L. Leonard, *International Regulation of Fisheries* (1944), pp. 121-136; see further sources cited there. P. C. Jessup, "The Pacific Coast Fisheries," this JOURNAL, Vol. 33 (1939), p. 129, discusses the problem and the bills introduced in Congress to extend control over adjacent high seas far enough to cope with it. The White House Press Release accompanying the Truman Coastal Fisheries Proclamation of September 28, 1945, suggests the connection of that Proclamation with the desire to prevent a repetition of such trouble as that with Japan over Alaskan salmon. Department of State Bulletin, Vol. 13 (1945), p. 484.

⁷ Cf. Department of State Bulletin, Vol. 14 (1946), p. 346.

⁸ *Treaties and Other International Acts Series*, No. 1849; this JOURNAL, Supp., Vol. 43 (1949), p. 174. The Norwegian comment on the treaty at the San Francisco Conference urged that the Japanese whaling fleet should not be expanded, lest the Whaling Convention prove inadequate with greater pressure upon the depleted world stock of whales. *The New York Times*, Sept. 7, 1951, p. 6, col. 1.

⁹ For the Pacific Halibut Treaty of 1937, revising the earlier conventions, see 50 Stat. 1351; U. S. Treaty Series, No. 917; this JOURNAL, Supp., Vol. 32 (1938), p. 71. For the Sockeye Salmon Treaty of 1930, see 50 Stat. 1355; U. S. Treaty Series, No. 918; this JOURNAL, Supp., Vol. 32 (1938), p. 65. On these treaties and the regime under

enter the fishery, Japan should be expected to conform to the regulations regarding tuna which may eventually be laid down by the United States, Mexico, Costa Rica and other countries to the south under the recently concluded treaties,¹⁰ which now provide for co-operative investigations and which are expected to be followed by such regulations as may be necessary. If Japanese nationals and vessels, or those of any other state, were to enter these preserved fisheries, and to take immature or undersized fish or use prohibited equipment or fish during closed seasons, the conservation efforts would come to naught and the American and Canadian fishermen who have borne the brunt of the restrictions would rise up in righteous indignation. These are fisheries which would not exist at their present level of abundance if it were not for the close supervision of fishing operations in the area. Equity and justice require that such natural resources which have been built up by systematic conservation and self-denying restricted utilization, together with the industries based upon them, be protected from destructive exploitation by interests which have not contributed to their growth and development.

It thus appears obvious that any Japanese fishing activities in these areas of the high seas close to the American Continent should conform to present and future conservation regulations; this is the very least which should be expected. But this, alone, is not enough. In view of the past record and the probability of the repetition of trouble if Japanese fishermen carry on their activities in these conserved fisheries close to American shores (or if American fishermen should cross the Pacific and begin to fish in waters near Japan), it is important that steps be taken now to prevent the occurrence of such events which can only bring about a deterioration of the good relations between the American countries and Japan which accompany the return of peace. Whether or not there may be any legal right under international law for the United States, Canada, *et al.* to exclude Japanese fishing activities from these areas of the high seas contiguous to our Continent in which our people have fished on a substantial scale,¹¹ the people of our Pacific coast who are most closely affected feel that there is or should be such a right. As the United States asserted on November 22, 1937, in the Bristol Bay controversy with Japan over the attempt of Japanese fishermen to catch salmon on the high seas off Alaska:

them, see J. Tomasevich, *International Agreements on Conservation of Marine Resources*, (1943), pp. 125-265; statement by W. M. Chapman of the Department of State, Hearings before a Subcommittee of the Senate Committee on Foreign Relations on the Fisheries Conventions, July 14, 1949, pp. 52-56.

¹⁰ The Convention with Mexico, signed Jan. 25, 1949, is published in T.I.A.S. 2094; this JOURNAL, Supp., Vol. 45 (1951), p. 51. That with Costa Rica, signed May 31, 1949, is in T.I.A.S. 2044. On both, see also the Hearings cited in note 9 *supra*.

¹¹ Cf. J. W. Bingham, *Report on the International Law of Pacific Coastal Fisheries* (1938). See also E. W. Allen, "The Fishery Proclamation of 1945," this JOURNAL, Vol. 45 (1951), p. 177.

These resources have been developed and preserved primarily by steps taken by the American Government in cooperation with private interests to promote propagation and permanency of supply. But for these efforts, carried out over a period of years, and but for consistent adherence to a policy of conservation, the Alaska salmon fisheries unquestionably would not have reached anything like their present state of development.

* * *

The cost of the extensive efforts made by the Government to regulate salmon fishing and to perpetuate the supply of salmon has been borne by the American people, and not infrequently American fishermen have suffered loss of employment and income as a result of the various restrictions imposed. Because of such sacrifices, and the part that American citizens have played in bearing the cost of conserving and perpetuating the salmon resources, it is the strong conviction and thus far unchallenged view on the part of millions of American citizens on the Pacific Coast interested in the salmon industry and on the part of the American public generally that there has been established a superior interest and claim in the salmon resources of Alaska.¹²

In that controversy the Japanese Government agreed that Japanese vessels should not enter the Alaskan salmon fisheries in question, although they were outside Alaskan territorial waters.

Although the United States Coastal Fisheries Proclamation of September 28, 1945,¹³ does not specifically refer to a right to exclude nationals of other states from fishing in areas covered by it, we should remember that it proceeds on the theory that (a) proximity to the coastal state, and (b) development and maintenance of fishing activities on a substantial scale by the coastal state and any other states, afford a proper and sufficient basis for the establishment by the coastal state (and any other states whose nationals have developed and maintained fishing activities in the area) of limited conservation zones in which all fishing activities shall be subject to regulation and control by the state or states establishing such zones. In many quarters there is a belief that the regulation and control, justified on the basis of such proximity and substantial fishing activities, should be sufficient to cover the exclusion of all newcomers from engaging in the fisheries of the conservation zone, if there are obviously not enough fish for everybody to catch as much as they want (*e.g.*, the Pacific halibut fishery covered by the treaty between the United States and Canada, under which

¹² Department of State Press Releases, Vol. 18 (1938), p. 413.

¹³ 10 Fed. Reg. 12304; this JOURNAL, Supp., Vol. 40 (1946), p. 46. Regarding this proclamation, see E. M. Borchard, "Resources of the Continental Shelf," this JOURNAL, Vol. 40 (1946), p. 53; J. W. Bingham, "The Continental Shelf and the Marginal Belt," *ibid.*, p. 173; E. W. Allen, "Legal Limits of Coastal Fishery Protection," Washington Law Review, Vol. 21 (1946), p. 1; W. M. Chapman, "United States Policy on High Seas Fisheries," Department of State Bulletin, Vol. 20, No. 498 (Jan. 16, 1949), p. 67; C. B. Selak, "Recent Developments in High Seas Fisheries Jurisdiction under the Presidential Proclamation of 1945," this JOURNAL, Vol. 44 (1950), p. 670.

a maximum total catch is set for each season and all fishing for the season ends when that total is reached). The Yoshida note quoted accepts such a position as a temporary measure pending the conclusion of new treaties; it does not say that the Japanese Government will require its nationals and vessels to comply with conservation regulations in these high seas areas near other states' shores, but that Japan will prohibit them from carrying on fishing operations in such waters if Japanese nationals or vessels were not conducting operations there in 1940.

Whether or not as a matter of international law or morality Japanese vessels and fishermen could be excluded *unilaterally* from fishing in these established and regulated high seas fisheries, it is for the best interests of all concerned that the United States and Japan should speedily enter into agreements which will keep Japanese fishing activities out of these relatively small areas off the American Continent and keep American fishing activities away from Japanese waters. We all want to see international co-operation between the two countries. Such co-operation is not promoted by the fishermen of either country fishing close to the other or in proximity to the fishermen of the other country. American fishermen and large groups of our general population, particularly on the Pacific coast, are likely to feel that any Japanese fishing activities in our established fisheries close to American shores would be a constant threat to their economic security. Rightly or wrongly, this vocal and influential group of Americans would be likely once again to suspect such Japanese fishing vessels operating close to our shores of all sorts of political and military espionage and sabotage; wholly unfounded as one may hope and expect such suspicions to be, their prevalence and spread will in fact greatly impair the maintenance of friendly relations with Japan. Similarly, one may suppose that many Japanese would look askance at what they would regard as encroachments upon a vital source of Japanese food supply, if American fishing vessels were to begin fishing in waters close to Japan. Popular reactions are highly important to good international relations, and commercial fishermen are not famous for their tolerance or willingness "to turn the other cheek"!

Thus with a view primarily to avoiding causes for potential friction, it would appear desirable for the United States and Japan to enter into a mutual agreement under which the fishing vessels of each country would be required to refrain from carrying on fishing activities in areas close to the other country. This might take the form of an undertaking that fishermen of each country should not fish within a specified distance (such as 100 or 150 miles) of the shores of the other, or, as suggested by the language of the Yoshida note, it might be in the form of an agreement that they should keep out of conserved areas established unilaterally or by treaty in which such fishermen had not been engaging in operations at a specified date.

Such an arrangement would do no violence to the economic needs of either country; each has fishing grounds nearer home so that there is no real need for its fishing vessels to cross the wide Pacific to seek fish. Such an arrangement for the purposes of avoiding international irritations and conflicts, and of preventing the breakdown of conservation regimes on either side of the Pacific, would not appear to be in conflict with any overall economic policy of the United States in favor of equal opportunity of access to raw materials. If, however, anyone should look upon such an international agreement as not wholly consistent with any of our international economic policies, then the purposes of the agreement should suffice to warrant an exception to, or apparent departure from, the economic policy in question.

There is no possible doubt that under international law, as well as under the law of the United States, such a treaty could be validly entered into by the United States and Japan. Such a treaty would in no way impair the legal rights of any third nation to fish wherever, and in whatever manner, it now has a right to fish. During the past century numerous nations have concluded bilateral and multilateral treaties and agreements under which they have restricted their own fishermen and vessels from fishing on the high seas in particular places or in a particular manner. The almost unlimited control which international law permits each nation to exercise over its own nationals and its own vessels on the high seas is far more than enough to warrant the conclusion that two or more nations may validly enter into such an agreement regulating the conduct on the high seas of their own vessels and their own nationals.¹⁴

Nor should the immediate conclusion of such a treaty between Japan and the United States (and doubtless also between Japan and Canada¹⁵) await the time when it may become feasible to deal with the long-range fisheries problems between Japan and the Soviet Union, or between the United

¹⁴ Apparently the only serious attempt to deny the validity of a treaty limiting the activities of nationals and vessels of the contracting parties on the high seas was one of the American arguments in the North Atlantic Coast Fisheries Arbitration of 1909-1910 with Great Britain, in which it was contended that the American renunciation of the "liberty heretofore enjoyed or claimed . . . to take . . . fish on, or within three marine miles of any of the . . . bays" of British North American possessions, could not be interpreted to apply to those broader bays which were not part of British territorial waters. In its award the tribunal specifically denied this American contention, saying: "The United States contend: 1st. That while a State may renounce the treaty right to fish in foreign territorial waters, it can not renounce the natural right to fish on the high seas. But the tribunal is unable to agree with this contention. Because though a State can not grant rights on the high seas it certainly can abandon the exercise of its right to fish on the high seas within certain definite limits." (Scott, *Hague Court Reports* (1916), p. 141, at p. 182.)

¹⁵ See statement by Canadian Delegate L. B. Pearson at San Francisco Conference. *The New York Times*, Sept. 8, 1951, p. 4, col. 1.

States and the Soviet Union. Eventually such arrangements with the U.S. S. R. would seem desirable, but in the present state of international affairs they may be long postponed. Fortunately such delays in doing all that might be desired with the problems of North Pacific fisheries do not seriously impede the making of satisfactory arrangements with Japan at the present time when relations are cordial and conditions ripe for taking care of these matters before controversies again arise. It is understood that there is slight connection in fact between the fishing areas and fishing industries which concern Japan and the U. S. S. R., and those for which it is urged that agreement be reached now between the United States and Japan (and Canada and Japan). It appears that in recent years there has been almost no fishing by Soviet vessels near Alaska or by American vessels off Siberia. The international controversies in this field which have actually arisen in the pre-war years, and which may be expected in the immediate future unless steps are now taken to prevent them, are those between the United States and Japan, not between the United States and the Soviet Union. Therefore it is urged that there should be no delay by the United States and Japan in entering into an agreement along the general lines suggested, which will do so much to bring about an era of real peace and good will in the Pacific.

WM. W. BISHOP, JR.

INTERNATIONAL LAW OR NATIONAL INTEREST

Two recent books illustrate current trends of thought as to the conduct of nations within the community of nations. They do not present new attitudes; they represent the long struggle between advancing law and the maintenance of the interest of individual units of society.

Professor Hans Morgenthau writes *In Defense of the National Interest* and regards the interest of the nation as superior to anything else. He appears to regard the pursuit of accepted moral principles as in itself immoral: "a foreign policy guided by moral abstractions, without consideration of the national interest, is bound to fail"; "the appeal to moral principles in the international sphere has no concrete universal meaning" (pp. 33-35). To law and the United Nations he devotes about three pages, under the heading of "legalism"; this approach he speaks of as an "erroneous tendency" of the American people. The United Nations might possibly contribute in the field of procedure, by development of new techniques of diplomacy (pp. 101-104). It is "an iron law of international politics, that legal obligation must yield to the national interest" (p. 144); and the only alternative roads to peace are war or negotiation. There is no place whatever for law or morality in Professor Morgenthau's system; it is "realism" stated in most extreme form.

Professor E. D. Dickinson has written a book entitled *Law and Peace*, in which he recognizes the inadequacy of present international law and makes some thoughtful and constructive suggestions for its improvement. "How defective a system in which order must always bow out backward, so to speak, in the presence of sovereignty!" (p. 89). Sovereignty—a word which doubtless corresponds to national interest—was perhaps necessary when nations lived in a state of nature, and it is a consequence of the insecurity of national life in an imperfect community of nations; but it is also a shibboleth (p. 109). Enduring peace with law will be hard to obtain, but there is no doubt in Professor Dickinson's mind that the struggle for peace and justice must increasingly be waged with law. He is not content with anarchy.

For centuries human beings have sought relief from conflict through law and government; it was natural that they should look in the same direction for relief from conflict between nations. One failure—the League of Nations—has only made people eager to try again toward an international legal order; they know of no other solution. Nevertheless, there is a strong trend of thought toward what is called "realism" in the conduct of international affairs, represented in extreme statement by Professor Morgenthau's book, and in such concrete forms as impatience with "legalism" in the debates of the United Nations, refusal to refer questions to the International Court of Justice, the reservation attached by the United States to its acceptance of the Optional Clause, the disregard of legal obligations and judicial settlement shown by India, Iran and other states in current controversies. In such upset times as we live in at present, it is perhaps natural to turn to the known methods of the past and to rely upon national strength and war, rather than upon new law and institutions. Yet it seems to this writer that there are certain defects in the so-called "realistic" thinking which should be noted; they are not new or original; they simply need to be recalled to our attention.

In the first place, it is incorrect and dangerous to put the nation first in one's thinking. It is the individual human being for whom all social institutions are maintained; the state is simply an agency to serve the human being. If the state is to be an end in itself, and allowed to become all powerful, the rights of individuals will be submerged and other nations will be absorbed. We see this happening about us: two world wars and a current "cold war" show that the peoples of the world are unwilling to accept a morality which is subsumed under the heading "national interest."

A second defect is the assumption that the best protection which can be provided for the individual human being is that afforded by his state. Perhaps this could be said in the past, though it has never been true that any one state could protect its members against other states. Today, however, in the new pressures of interdependence, not even the strongest of states can protect its individuals against economic forces, or against the

risks of war which modern technical developments have made so destructive that humanity can no longer afford to use it.

Again, it is not necessarily realistic to rely solely upon the strength of one's arm; on the contrary, this would seem to indicate a failure of intelligence. The combined wisdom of the community may be able to solve problems more easily, and the combined strength of the community may afford more protection than any one state can offer its members.

Finally, it seems to me to be incorrect to present law and power politics as irreconcilable alternatives. Political power is always present, whether within or lacking a system of law and government. It is an energy which can be used for the good of mankind, or for the aggrandizement of one or a few persons or states. It is, like fire, an energy which can be dangerous or can be helpful. It must be brought under control, and this is done through the establishment of law and governmental institutions. Within such a system, power politics will continue to operate, but under a degree of control which will depend upon the efficiency of the system established.

As things now stand, each nation must maintain its national strength and be prepared to battle when other procedures fail, but this does not exclude development toward a legal order to replace the present inadequate and dangerous methods of resolving disputes between nations. Human beings, though distracted by present stresses, will ultimately turn, or be forced to turn, to international law, and to build it up into a stronger system.

CLYDE EAGLETON

RIGID VERSUS ADJUSTABLE TECHNIQUES IN DIPLOMACY

Recent critics of the Department of State have complained that "under its present leadership" the policy of the Department has been "to go slow, play cautious, and be nice."¹ It is claimed that such a tactic is bound to be ineffectual in dealing with Moscow and Prague. Other critics have complained that the Department has failed to respond vigorously to the charges hurled at it by hostile politicians within the country; the Department seems, it is said, to have tried to avoid or evade or run away from controversy.² It depends on public support for successful operations in many ways but does not try very hard to win that support. The second situation differs notably from the first, of course, being a case in domestic rather than international politics, but the choice involved is substantially the same in the art of group dynamics and constitutes an important problem, apart entirely from the substance of the questions at issue between the Department and its opponents, domestic or foreign.

To begin with, the problem is by no means new nor is the preference of the Department for the conciliatory technique peculiar to its present leader-

¹ Editorial, "Plaintive Protests" in *Washington Daily News*, Aug. 9, 1951, p. 38.

² Editorial, "Striking Back" in the *Washington Post*, Aug. 21, 1951, p. A-9.

ship; indeed, the present Secretary of State is personally not the most conciliatory individual in the world by a long distance. It is the orthodox, standard, and well-approved technique of diplomacy to be conciliatory. It is sometimes argued that we should have a department in the Government devoted to the maintenance of peace; that is actually the mission of the Department of State in large part, and this is largely the explanation for its preference for the conciliatory technique; an attitude of the opposite tone would infallibly lead to accusations of chauvinism or "how diplomats make war."³ The Department is also mainly an administrative agency and decisions to take drastic or coercive action must properly come from the executive or representative arms of the Government, perhaps extending to the employment of economic or military means. As for justifying its case before public opinion, there probably is some doubt whether the Department really does need popularity in order to operate effectively and in any case public opinion can be molded better by some of the many educational activities carried on by the Department than by engaging in political controversy.

In the second place, such an attitude does not involve any sacrifice of position or of rights. It does not necessarily mean appeasement. Silence on the part of the Secretary in the face of criticism implies neither admission of guilt nor lack of ability to answer. It merely means that, rightly or wrongly, he does not believe that there is anything much to be gained by answering back. So in dealing with another government the persistence, through thick and thin, year in and year out, in the conciliatory attitude does not sacrifice any rights and is based upon the well-established belief that there is more to be accomplished in this manner than by antagonizing the opposition. Hence the seeming rigid adherence to the tactic of conciliation, patience, and prudence.⁴

It is interesting to note that an opposite type of rigidity is maintained, or an opposite type of attitude, policy, and technique is rigidly maintained, in other quarters. It is the tactic of totalitarianism, which does not admit the possibility of sharing the good things of the earth with any opponent, never to compromise or yield or admit or do anything but fight sharply all the time in one way or another.⁵ This attitude, in part but not entirely the creation of Marxian theory, is based on an assumption of inevitable and unalterable hostility on the part of the opposition. It involves many sub-

³ F. Neilson, *How Diplomats Make War* (New York, 1915).

⁴ See two other recent contributions to this controversy over methods in diplomacy, both pleading for "the diplomatic approach (old style, to be sure)" as against "emotional diplomacy" in the *Washington Post*, Sept. 3, 1951, p. 4, cols. 3, 6.

⁵ N. Leites, *Operational Code of the Politburo* (New York, 1951), reviewed below, p. 819.

ordinate elements, including concealment, misrepresentation, and so on, which are not very relevant here.⁶

This illustration would seem to give a clue to the proper solution of the problem. The attitude of the totalitarian leaves the opponent little liberty to do anything but answer in kind. By hypothesis, and, it may be added, by experience, there is little possibility of eliciting a conciliatory attitude on the part of the totalitarian. To persist in trying to deal with him by the standard methods is to waste time and energy, create false impressions, and court failure in the end. On the other hand, the non-totalitarian government, including our own Department of State, is hardly equipped, in terms of personnel, psychology, experience, or training, to play the totalitarian game. It might be added that in its own domestic sphere, the totalitarian government pursues a similar policy of telling the citizenry what it wants them to know and making them accept it.

In short, it would appear that an adjustable technique is preferable to any rigid tactic. The standard conciliatory technique was based upon the assumption, accurate enough when that technique was developed, that others would employ it also and that, if mutually employed, it was the most fruitful technique available. Today this does not hold. Hence some modification seems indicated. In the international sphere it also appears that strong action by the executive and representative arms is called for in view of all the circumstances. On the domestic side likewise it would appear that a little less aloofness and indifference might be useful or even a reasonable amount of competent and lively statement of facts and explanations. In both fields what is to be avoided most is rigidity of technique of one kind or another and lack of capacity for alternation and realistic adjustment.⁷

PITMAN B. POTTER

THE ORDER OF THE INTERNATIONAL COURT OF JUSTICE IN THE ANGLO-IRANIAN OIL COMPANY CASE

The order of the International Court of Justice, under date of July 5, 1951,¹ in the Anglo-Iranian Oil Company Case, has raised a number of interesting questions of law and procedure in respect to which there appears to be considerable controversy.

On May 26 proceedings were instituted before the Court by Great Britain against Iran by an application addressed to the Registrar in accordance with Article 40 of the Statute of the Court. Subsequently, on June 22, Great Britain submitted a request to the Court to indicate certain interim measures of protection calculated to prevent damage to the property and interests

⁶ P. B. Potter, *Introduction to the Study of International Organization* (New York, 1948, 5th ed.), pp. 269-270.

⁷ See previous discussion, "The Alternative to Appeasement," in this JOURNAL, Vol. 40 (1946), p. 394.

¹ For text, see below, p. 789.

of the Oil Company, its national, pending the decision of the Court on the merits of the case, and to preserve the right of Great Britain to have a decision of the Court in its favor duly executed, should the Court render such a decision.

In accordance with Article 41 of the Statute of the Court, the Court is given power "to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." This power given to the Court corresponds more or less to that given to national courts to issue injunctions in cases where it is alleged that irreparable damage would be done to the interests of the plaintiff before a final decision on the merits of the case could be given. Under municipal law the jurisdiction of the court does not enter into the issue. If the court to which the request for injunctive relief does not have jurisdiction, some other municipal court will, excluding the exceptional case in which there is legislation precluding relief by injunction. By contrast, the question presented in the Anglo-Iranian Oil Co. case is the relation between the interim measures of protection requested by the British Government and the jurisdiction of the International Court to hear the case.

It is agreed that the Court is not obliged to determine definitively whether it has jurisdiction in the case before it can give provisional protection to the property involved. The very purpose of the interim measures of protection is to anticipate possible injury to the property pending the delays incident to a decision upon the question of jurisdiction as well as a decision upon the merits of the case. But at the same time the Court must have reasonable ground for believing that it will have jurisdiction when the case comes on to be heard; otherwise the Court might be led to interfere in questions which fall within the reserved class of domestic questions withheld from submission to the Court, whether in the declarations of the two parties accepting the compulsory jurisdiction of the Court or in the broad provision of Article 2(7) of the Charter of the United Nations.

Was there, then, reasonable ground for the assumption by the Court that when the case came on to be heard it would find that it had jurisdiction? The British declaration under Article 36(2) of the Statute of the Court recognized as "compulsory *ipso facto* and without special agreement" the jurisdiction of the Court in all four of the groups of legal disputes listed in the article. Exceptions were entered covering disputes for which other methods of peaceful settlement were provided, disputes with members of the British Commonwealth of Nations, disputes with regard to questions which by international law fell exclusively within the jurisdiction of the United Kingdom, disputes under consideration by the Council of the League of Nations, and disputes arising out of events occurring during the war; but these did not come into question, since the application instituting proceedings was made by Great Britain itself. On the other hand the Iranian dec-

laration, made on October 2, 1930, and ratified in 1932, was limited to the first group of disputes falling under Article 36(2), namely, "situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration." Further exceptions were entered covering disputes relating to the territorial status of Persia, disputes in respect to which the parties had agreed upon some other method of pacific settlement, and disputes with regard to questions which by international law fell exclusively within the jurisdiction of Persia, with the further reservation of a right to suspend proceedings in respect to any dispute which had been submitted to the Council of the League of Nations.

It would appear, then, that Great Britain could not maintain that the Court had jurisdiction of the case as being a "question of international law" under Article 36(2 b) of the Statute of the Court, although that issue did call for consideration under another head. What treaty or convention between Iran and Great Britain was there which might be made a basis of probable jurisdiction? In its application instituting proceedings, under date of May 26, 1951, the British Agent first set forth the facts giving rise to the dispute,² namely, the refusal of Iran to abide by the arbitration clause in the contract between Iran and the Oil Company, and the consequent denial of justice; and he then proceeded to argue the question of jurisdiction on the basis of two kinds of treaties accepted by Iran, the first being certain treaties and conventions by which Iran was under obligation to give most-favored-nation treatment to British nationals and by which Iran was under obligation to treat the nationals of other states in accordance with the principles of international law, and the second being a direct treaty obligation between Iran and the United Kingdom by which Iran was obligated to treat British nationals in accordance with the principles of international law. In the first case the obligation of Iran to treat British nationals in accordance with the rules of international law was by inference from one set of treaties to another, and in the second case the obligation was direct, arising out of an exchange of notes which took place on May 10, 1928, at the time of the abolition of capitulations in Persia, when Persia undertook that henceforth British nationals in Persia "shall be admitted and treated on Persian territory in conformity with the rules and practice of international law."

The date of this exchange of notes, however, calls for an interpretation of the meaning of the Iranian declaration of 1930, in which the acceptance of the jurisdiction of the International Court of Justice is, as has been indicated above, limited to "situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration." Grammatically taken,

² For factual background of dispute see current note below, p. 749.

"subsequent" appears to relate to "treaties or conventions," which, if it were the correct interpretation, would nullify the argument of Great Britain based upon the earlier agreement of 1928. The logical interpretation, however, is that the word "subsequent" relates to "situations or facts." This is assumed by Great Britain to be the correct interpretation and it is consistent with the declarations made by a number of other states under Article 36 of the Statute.

It is of interest to note that although the agreement of 1933 between Iran and the Oil Company was not an agreement between two states, but between a state and a private company, nevertheless Great Britain, in its application instituting proceedings, argued that the agreement "may, having regard to the circumstances in which it was made, be held to be 'a convention' within the meaning of that expression in the declaration deposited by the Imperial Government of Persia relating to Article 36(2) of the Statute of the Court."

Accepting the argument of Great Britain on the basis of treaties or conventions not as settling the question of jurisdiction definitively but merely as indicating that the Court might reasonably find that it had jurisdiction on that basis, the next question is whether the treatment by Iran of the Anglo-Iranian Oil Company was "in accordance with the principles of international law." The Government of Iran, looking upon its nationalization legislation as a matter essentially within its domestic jurisdiction, stood upon the ground of its sovereignty, rejecting both the jurisdiction of the Court as well as other methods of settlement set forth in the Charter. On the other hand, Great Britain, asserting the traditional right of a state to intervention on behalf of its national when there appears to be a denial of justice, held that the treatment of the Oil Company by the Iranian Government, and specifically the refusal of the Iranian Government to submit the dispute to arbitration as provided in its contract with the Oil Company, constituted a breach of the rules of customary international law.

The order of the Court under date of July 5 is directed solely to the request for interim measures of protection. It recites the specific measures requested by Great Britain and the fact that respect by the Iranian Government for the measures indicated would in no way prejudice the position of the Iranian Government in the proceedings at which the definitive jurisdiction of the Court would be determined, and, if jurisdiction be found, in the proceedings on the merits of the case. The order, after reciting the reply of the Iranian Government expressing the hope that the Court would declare that the case was not within its jurisdiction "because of the legal incompetence of the complainant and because of the fact that exercise of the right of sovereignty is not subject to complaint," proceeds to find that the complaint made in the British application was one of an alleged violation of international law by the breach of the agreement with the Oil Company and by the denial of justice resulting from the refusal of the

Iranian Government to accept arbitration in accordance with the terms of the agreement, and that "it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international jurisdiction." Curiously enough, the order of the Court makes no reference to the "treaties or conventions accepted by Persia" upon which its jurisdiction depended under the terms of the Iranian declaration of 1930.

Two of the judges, Judge Winiarski and Judge Badawi Pasha, dissented, arguing that the question of interim measures of protection was linked, for the Court, with the question of jurisdiction, and that the Court had power to indicate such measures only if it held, at least provisionally, that it was competent to hear the case. Not that the Court should pronounce finally upon the question of competence before indicating interim measures of protection; "but the Court must consider its competence reasonably probable." The power given to the Court by Article 41 of the Statute to indicate interim measures of protection, said the dissenting judges, was not unconditional; if there was no jurisdiction as to the merits there could be no jurisdiction to indicate interim measures of protection. It was not sufficient that there might be "a possibility, however remote," that the Court might be competent; there was no presumption in favor of the competence of the Court; if there existed serious doubts as to its jurisdiction, then the measures of protection could not be indicated. Iran had refused to appear before the Court and had put forward reasons for its attitude. The Court should, therefore, have first decided "in a summary way and provisionally" whether the arguments against its jurisdiction outweighed those in favor of it.

The case is of special interest, not only because of the issues involved, but because of the fact that the Court was not deterred from issuing its order by reason of the refusal of Iran to appear before the Court. Article 36(2) of the Statute provides for compulsory jurisdiction "*ipso facto* and without special agreement" in accordance with the reciprocal declarations made by particular governments. Does this mean that a state, after making a declaration such as that of the Iranian Government in 1930, may nevertheless use its own judgment whether the dispute falls within the scope of its declaration, so that the Court does not have jurisdiction unless the state, in pursuance of its declaration, consents to appear before it in the concrete case; or does the provision of Article 36(2) mean that a state, in making a declaration of compulsory jurisdiction, has already given provisional assent to the jurisdiction of the Court in the concrete case; so that the Court may then proceed, on the basis of Article 36(6), to decide definitively whether or not it has jurisdiction and then, if one of the parties fails to appear, give an *ex parte* judgment on the merits of the case in accordance with the terms of Article 53 of the Statute?

CHARLES G. FENWICK

THE COLOMBIAN-PERUVIAN ASYLUM CASE AND PROOF OF CUSTOMARY INTERNATIONAL LAW

The Judgment of November 20, 1950, of the International Court of Justice in the *Colombian-Peruvian Asylum Case*¹ provides a noteworthy illustration of the judicial technique employed in making a determination as to the existence or non-existence of a rule of customary international law in a particular case.

Article 38, paragraph 1, of the Statute of the International Court of Justice directs the Court to "apply . . . (b) international custom, as evidence of a general practice accepted as law." The curious drafting of this clause tends to distort the well-established distinction between practice or usage, which is not obligatory; and customary international law, which is what the Court actually applies. Thus Judge Manley O. Hudson writes:

It is not possible for the Court to apply a custom; instead it can observe the general practice of States, and if it finds that such practice is due to a conception that the law requires it, it may declare that a rule of law exists and proceed to apply it. The elements necessary are the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time. The appreciation of these elements is not a simple matter, and it is a task for persons trained in law.²

In his Working Paper on Article 24 of the Statute of the International Law Commission, Judge Hudson expressed the elements required for the establishment of a principle of customary international law as follows:

11. Seeking with Brierly [Law of Nations, 4th ed. (1949), p. 62] "a general recognition among States of a certain practice as obligatory," the emergence of a principle or rule of customary international law would seem to require presence of the following elements:

- (a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
- (b) continuation or repetition of the practice over a considerable period of time;
- (c) conception that the practice is required by, or consistent with, prevailing international law; and
- (d) general acquiescence in the practice by other States.

Of course the presence of each of these elements is to be established (*doit être constaté*) as a fact by a competent international authority.³

¹ I.C.J. Reports, 1950, p. 266; this JOURNAL, Vol. 45 (1951), p. 179.

² Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942—A Treatise* (1943), p. 609. Cf. J. L. Brierly, *The Law of Nations* (4th ed., 1949), pp. 60 ff.; Hans Kelsen, *The Law of the United Nations* (1950), p. 533.

³ U. N. Doc. A/CN.4/16, March 3, 1950. This paragraph was omitted from the Report of the International Law Commission covering its Second Session, 1950, U. N. Doc. A/1316; this JOURNAL, Supp., Vol. 44 (1950), p. 105.

Theoretical difficulties involved in the determination of these elements or of the methods and procedures by which customary rules of international law are created or evolve from non-obligatory practice often receive more attention than the fact that in a given case courts have relatively little difficulty in determining whether or not an applicable rule of customary international law exists.⁴ Max Sørensen observes that the most characteristic feature of customary international law is that it is established not by acts directed expressly towards the creation of international law but by an appreciation (*un raisonnement*) based upon observation of the conduct of states, which, by deriving a general rule from conduct, is the inverse of the traditional method by which courts apply a general rule to specific conduct.⁵ The evidential value of a particular appreciation as to the existence of a rule of customary international law is itself a matter of appreciation. Yet there is a well-recognized practical hierarchy of "law-determining agencies."⁶ The *imprimatur* given to a customary rule of international law by the International Court of Justice would suffice to clinch its recognition in most cases. However, it would seem that a customary rule of international law may exist because of the presence of the requisite elements, *i.e.*, because of the behavior of states and a conclusion therefrom, without their establishment as facts by "a competent international authority." The behavior is certainly a phenomenon not limited to the observation of an international court; and the conclusion as to the legal significance of the behavior may properly be drawn by a national court (*cf. The Paquete Habana*) or by a foreign office or by the writer of a treatise, with, of course, varying degrees of authoritativeness.

Of the elements required for the creation or emergence of a customary rule of international law, the so-called "material" elements present fewer difficulties than the "psychological" elements. Observations of the practice of states in given international situations permit conclusions as to whether conduct is concordant, general, and consistent over a period of time. The periods of time required may vary: the establishment of customary rules of international air law can have no temporal equivalent to the "immemorial customs of the sea."⁷ Variations from the concordance, generality, or consistency of a practice are grist for judicial appreciations. The evidential value of abstentions, as distinguished from positive acts, with reference to the establishment of customary rules of international law is dealt with in *The Paquete Habana*; and, in *The Lotus Case*, the Court observes

⁴ See, for example, *The Scotia* (1871), 14 Wall. 170; *The Paquete Habana* (1900), 175 U. S. 677; *The Lotus* (1927), P.C.I.J., Ser. A, No. 10.

⁵ Max Sørensen, *Les Sources du Droit International* (1946), p. 85.

⁶ See Georg Schwarzenberger, *International Law*, Vol. I (2d ed., 1949), pp. 8 ff.

⁷ Cf. Helen Silving, "'Customary Law': Continuity in Municipal and International Law," 31 Iowa Law Review (1946), pp. 614, 625.

that "only if such abstention were based on their [states] being conscious of having a duty to abstain would it be possible to speak of an international custom."⁸

The existence of a conception that a practice is required or forbidden before a customary rule of international law may be said to exist—the *opinio juris sive necessitatis*—is one of the psychological elements which has created more difficulties in theory than in practice.⁹ Theoretically, it appears to involve a circularity of reasoning to speak of law as existing when it is required by law. However, it is conduct or abstention which is required by law and the proper way to express the process by which customary international law is created is to say that a particular pattern of state conduct, hitherto legally discretionary, has acquired obligatory force through its general acceptance by states as a legal obligation.

The practical procedure by which the presence or absence of the material and psychological elements requisite for a determination as to the existence or non-existence of a particular customary rule of international law is admirably illustrated in *The Paquete Habana* and the *Colombian-Peruvian Asylum Case*. In the former the United States Supreme Court concluded:

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. . . .¹⁰

In the *Colombian-Peruvian Asylum Case*, the International Court of Justice observed in part:

The Colombian Government has finally invoked "American international law in general." In addition to the rules arising from agreements which have already been considered, it has relied on an alleged regional or local custom peculiar to Latin-American States.

The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on

⁸ P.C.I.J., Ser. A, No. 10, p. 28. See, generally, on custom, Lazare Kopelmanas, "Custom as a Means of the Creation of International Law," *British Year Book of International Law*, 1937, pp. 127-151; Charles Rousseau, *Principes Généraux du Droit International Public*, Vol. I (1944), pp. 815-862; Sørensen, *op. cit.*, pp. 84-111.

⁹ See Sørensen, *op. cit.*, pp. 105 ff.; Silving, *loc. cit.*, pp. 622 ff.; Paul Guggenheim, "Les deux éléments de la coutume en Droit international," in *La Technique et les Principes du Droit Public—Études en l'Honneur de Georges Scelle* (1950), Vol. I, pp. 275 ff.

¹⁰ (1900), 175 U. S. 677.

the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law."

In support of its contention concerning the existence of such a custom, the Colombian Government has referred to a large number of . . . treaties [which the Court considered to be irrelevant to the issue before it].

. . .

Finally, the Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule of unilateral and definitive qualification was invoked or—if in some cases it was in fact invoked—that it was, apart from conventional stipulations, exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.

The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.

. . .

For these reasons, the Court has arrived at the conclusion that Colombia, as the State granting asylum, is not competent to qualify the offence by a unilateral and definitive decision, binding on Peru.¹¹

HERBERT W. BRIGGS

¹¹ *Loc. cit.*, pp. 276-278. Cf. *The Lotus Case*, *loc. cit.*, where, examining the practice of states in exercising criminal jurisdiction over foreigners and noting the absence of protests by states against the exercise of such jurisdiction, the Permanent Court of International Justice had little difficulty in concluding that the evidence failed to prove the existence of the *opinio juris* required for the establishment of a customary rule of international law in the sense contended for by the French Government.

THE INTERNATIONAL LAW STANDARD IN STATUTES OF THE UNITED STATES

The relation of municipal law to international law is properly a subject of inquiry by both practitioners and theoreticians. That all the questions which arise in this connection have not been settled will appear from continuing discussions concerning monism and dualism, the concept of domestic jurisdiction questions, and the doctrine of self-executing treaties. Cases of clear conflict between national law in the form of statutes and that which comprises international obligations tend to receive much publicity, and properly so. The extent to which there has been conformity of national legislation to customary international law and treaties seems to have received less attention. Techniques used to secure such conformity will appear to some extent from the manner in which statute-makers have by express provisions taken cognizance of the law of nations in written or unwritten form.

The present comment is based on illustrations to be found in the national statutes of the United States over the century and a half beginning with the organization of the National Government and extending through the public laws of the 76th Congress, *i.e.*, to 1941. (New problems that have marked the decade from 1941 to 1951, particularly in connection with the growth of public international organizations, seem to justify the devotion of a separate discussion to this period.) The limitations of a brief comment preclude more than a classification of provisions. No effort has been made to trace the legislative history of provisions, or to study their actual administration by executive agencies or interpretation by the courts. Nor, for the present purpose, has it seemed necessary to indicate which ones are now in force and which are not. As a further limitation, statutory references to the laws and usages of war have been omitted.

In the following sections, for the sake of convenience, mentions of international law in the statutes have been separated from mentions of treaties and conventions, although in the enactments the two are frequently referred to in the same contexts.

I

Provisions making reference to international law or to the "law of nations" may be grouped into those relating to (1) jurisdiction of domestic courts, (2) claims awards or payments, (3) commerce and navigation, (4) seamen's rights, (5) piracy, (6) diplomatic and consular matters, (7) retaliation, (8) neutrality, (9) advancement of international law, and (10) miscellaneous matters.

Within the first of these groups are provisions giving the Federal courts in the United States competence to hear cases involving "tort only in violation of the law of nations."¹ and to hear, "consistently with the law of na-

¹ 1 Stat. 73, 77; 36 Stat. 1087, 1093.

tions," cases involving ambassadors; also the authority to punish as "violations of the law of nations" actions by persons who "infract" the law relating to ambassadors.² Likewise included are provisions giving jurisdiction to Federal courts in a case where an individual is held for committing an act which he claims to have done for a foreign state and the validity and effect whereof "depend upon the law of nations."³ The Court of Claims has on occasion been authorized to hear claims based upon the allegedly "unlawful" detention of vessels.⁴

It is natural that there should be frequent references to international law in acts concerning the settlement of claims, whether the latter be single claims or groups of them to be adjudicated by national claims commissions.⁵ The language varies. There may be a reference to the law (and pertinent treaties),⁶ or to the law along with the "principles of justice,"⁷ or to "justice and equity,"⁸ or to the determination of whether the claims are "just," without direct mention of the law,⁹ or to "laws, usage and customs."¹⁰

Most of the direct references to the law of nations in connection with commerce and trade appear to have had relation to neutral rights.¹¹ In other contexts there are inferences with respect to the law, as, for example, in an early statute concerning registration of vessels, which mentioned vessels "lawfully condemned as prize,"¹² and in legislation concerning the Panama Canal, which sought to protect rights that the United States had by treaty "or otherwise" over that waterway.¹³ An enactment of June 9, 1910, referred to Congressional legislation "embodying or revising international rules for preventing collisions at sea."¹⁴

The practice of impressing American seamen provided occasion for legislation authorizing the appointment of agents to inquire into the situation of

² 1 Stat. 73, 80; 36 Stat. 1087, 1156.

³ 5 Stat. 539.

⁴ 49 Stat. 2368, 2369. For another authorization for adjudication by the same court on the basis of "rules of law, municipal and international," as well as treaties, see 23 Stat. 283.

⁵ The law of these commissions is discussed in Robert R. Wilson, "Some Aspects of the Jurisprudence of National Claims Commissions," this JOURNAL, Vol. 36 (1942), pp. 56-76.

⁶ 4 Stat. 446, 447.

⁷ 11 Stat. 408. See also 20 Stat. 171 (Caldera claim). For an authorization to settle in accordance with the principles of equity and of international law, see 31 Stat. 877 (Spanish Treaty Commission legislation).

⁸ 22 Stat. 697 (General Armstrong claim).

⁹ 13 Stat. 595, 596.

¹⁰ 12 Stat. 838 (Repentigny claim). Concerning the claim of La Abra Mining Company, the Congress, after the Mexican Government had drawn attention to the possibility of fraud, requested the President to investigate charges of fraud brought by the Mexican Government and, if he should be of opinion that the "honor of the United States, the principles of public law or considerations of justice and equity, require," to withhold payment of the award (20 Stat. 144, 145).

¹¹ See notes 27, 30, *infra*.

¹² 1 Stat. 287, 288.

¹³ See note 85, *infra*.

¹⁴ 36 Stat. 462, 463.

American citizens or others "sailing, conformably to the law of nations, under the protection of the American flag. . . ." ¹⁵ Later (1855) legislation related to consular officers' functioning in connection with the discharge of mariners who might be entitled to discharge "under . . . the general principles of maritime law as recognized in the United States." ¹⁶ A later revision added the words "or usages" after "principles." ¹⁷

Piracy as defined by the law of nations has been specified in the criminal law of the United States (as also in many of the country's extradition treaties). ¹⁸ A statute of 1900 included piracy as thus defined in provision for delivery (for trial) to United States authorities in American-occupied territory, of persons charged with listed crimes. ¹⁹

Diplomatic privileges are recognized in an early statute which provides for punishment as "violators of the law of nations" and "disturbers of the public repose" of those who prosecute any writ or allow process to issue against any ambassador or public minister of a foreign state. A separate section provides for fine and imprisonment of one who may "assault . . . or in any other manner infract the law of nations" by offering violence to the person of an ambassador or other public minister. ²⁰ Consular officers' functions have been provided for by statutes which may in exceptional cases refer to usage, ²¹ although more specific instructions are the rule. ²²

Congressional authorization to the President to take retaliatory action, or to discontinue such action, has sometimes been phrased in terms of international law. Examples are at hand in early legislation with reference to France. That of June 13, 1798, referred to French action "in violation of . . . the laws of nations"; the Act of June 25 set forth that when the French Government and those under its authority should "cause the laws of nations to be observed" by the French armed vessels, commanders and crews of American merchant ships might be instructed to "submit to any regular search" by the French, and to refrain from any "force or capture to be exercised by virtue hereof." ²³ In 1822 the President was conditionally authorized to suspend temporarily the operation of an Act imposing certain tonnage duties on French ships. ²⁴ Nearly a hundred years later (in 1916, this time without directing the legislation at any specific foreign country) Congress authorized the President to forbid the importation to the United States of goods from countries which denied entry to American goods "contrary to the law and practice of nations." ²⁵

¹⁵ 1 Stat. 477.

¹⁶ 10 Stat. 619, 625.

¹⁷ 11 Stat. 52, 62.

¹⁸ 3 Stat. 510, 513, 514; 12 Stat. 314; 35 Stat. 1145.

¹⁹ 31 Stat. 656.

²⁰ 1 Stat. 112, 118.

²¹ Cf. 11 Stat. 52, 65.

²² See, for example, 54 Stat. 758, in relation to the disposition of the estates of Americans dying abroad.

²³ 1 Stat. 565, 566; 572, 573. See also *ibid.*, 561.

²⁴ See note 61, *infra*.

²⁵ 39 Stat. 756, 799.

A relatively large number of references to international law occur in statutes concerning neutrality. In the basic law of 1794 and in later enactments there is mention of "cases in which, by the laws of nations . . ." vessels ought not to remain within the United States.²⁶ Legislation of 1917 contained a proviso that nothing in it should interfere with any trade in arms and munitions ". . . lawfully carried on before the passage of this title, under the law of nations. . . ." ²⁷ A joint resolution of March 4, 1915, authorized the denial of clearance to vessels believed to be about to carry arms, fuel, men or supplies to a ship of a belligerent nation "in violation of the obligations of the United States as a neutral nation." ²⁸ In this period came also legislation to prevent the sabotage or misuse of vessels in United States ports in violation of "obligations of the United States under the law of nations." ²⁹ The procedure of internment, both of vessels and of persons, was authorized by statutory provisions. The internment to which these penal provisions had reference was that "in accordance with the law of nations"; there were regulations applicable to vessels which "by the law of nations . . ." were not entitled to depart, and authorizations for the seizure of arms and other articles intended for export "in violation of law"; but, by the terms of the enactments, no interference was intended with trade that might have been lawfully carried on "under the law of nations or under the treaties or conventions. . . ." ³⁰ As is well known, the United States in its "neutrality" legislation of the period from 1935 through 1937 placed greater limitations upon its citizens than international law required. The Joint Resolution of November 4, 1939, however, stated in the preamble that in amending its neutrality legislation the United States waived none of its rights or those of its nationals "under international law," but expressly reserved such rights.³¹

Classifiable as enactments looking to the general advancement of international law are provisions for participation in the work of the International Commission of the American Republics on Public and Private International Law (pursuant to the Convention of August 23, 1906),³² in a conference on maritime law and the laws of war,³³ and in the codification effort under auspices of the League of Nations.³⁴ Also included would be the Joint Resolution of April 28, 1904, looking to an understanding among the principal maritime Powers "with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by

²⁶ 1 Stat. 381, 384. See also 3 Stat. 447, 449; 40 Stat. 217, 220.

²⁷ 40 Stat. 217, 225.

²⁸ 38 Stat. 1226.

³⁰ *Ibid.*, 223, 225.

³² 38 Stat. 312, 313, 451, 1126; 39 Stat. 260, 1056.

³³ 42 Stat. 599, 609.

²⁹ 40 Stat. 217, 220.

³¹ 54 Stat. 4.

³⁴ 46 Stat. 85. Cf. 52 Stat. 1114, 1146.

belligerents,"³⁵ and a similar expression in a naval appropriation bill of Dec. 13, 1929.³⁶

In a miscellaneous category fall references to the law of nations as a basis for valid claims to land,³⁷ and a provision for protection of an invention "where such protection is afforded by . . . international law."³⁸ There are, in a number of instances, indirect references to the law of nations in provisions for payment by the United States, as acts of grace, "without reference to the question of legal liability."³⁹ There have at times been mentions of "illegal" acts against foreign ships,⁴⁰ an expression which in this context would presumably or conceivably reach to more than municipal law. An unusual wording is that in legislation of 1940 which, in a proviso, directed that the Export-Import Bank should not make loans "in violation of international law as interpreted by the Department of State."⁴¹ In a resolution approved on June 13 of the same year, authorizing the Secretary of War and the Secretary of the Navy to assist governments of American republics to increase their military and naval establishments, the Congress included the proviso that nothing in the resolution would authorize the violation of "any established principles or precedents of international law."⁴²

II

Much more numerous than the statutory references to international law are those to treaties. Here classification according to subject-matter of the statutes is less feasible or useful. By far the greater number of provisions are in appropriation bills or other measures for carrying the treaties into effect. In some instances a single treaty may occasion a number of such legislative provisions.⁴³ The method is too well known to require extensive illustrative citations. The technique of harmonizing statutory with treaty law by specific language in the former is perhaps less familiar and, therefore, deserving of consideration.

³⁵ 33 Stat. 592.

³⁶ 45 Stat. 1165.

³⁷ 3 Stat. 709, 717; 4 Stat. 52, 53. Compare wording in 9 Stat. 631, 633, which refers to "equity," and in 12 Stat. 71, which mentions "the law of nations" and "the principles of equity."

³⁸ 40 Stat. 435, 436. There is also, along with mention of the law, reference to treaty obligations and "diplomatic representation."

³⁹ See, for examples, 42 Stat. 1154, 1161; 45 Stat. 483, 484; 46 Stat. 827.

⁴⁰ See 4 Stat. 619, 625; 16 Stat. 649; 23 Stat. 15. The wording varies to some extent. See, for example, an appropriation to cover "wrongful" seizure of a foreign vessel, in 12 Stat. 903.

⁴¹ 54 Stat. 38, 961.

⁴² 54 Stat. 396. An unusual provision was that in the resolution of April 17, 1866, protesting against foreign states' pardoning convicted persons on condition that the persons go abroad (the fact apparently being that many such persons came to the United States). The reference in this instance was not to the law of nations, but to acts inconsistent with the comity of nations (14 Stat. 353).

⁴³ See, for example, on the Treaty of Washington, 1871, 17 Stat. 24, 422, 598; 18 Stat. 66, 71; 129; 20 Stat. 206, 240.

At the outset it may be noted that many of the statutory references to international law, as mentioned in the preceding section, are not references to that law alone, but also to treaties.⁴⁴ Other situations which seem to merit consideration even in a brief comment are: (1) those in which the statutes provide that in their application there shall be no contravention of treaties; (2) those in which the authorization of some action is conditioned upon the terms of treaties; (3) those in which there is authorization for payments to indemnify for what has been done contrary to treaties; (4) those looking to termination or revival of treaties; (5) those in which there is provision for the replacement of treaties applicable to territory acquired by the United States; and (6) those in which statute-makers have sought to avoid the waiving of any rights under treaties.

The first of these categories finds illustration in references to commercial treaties, *e.g.*, that in a Tariff Act of Feb. 5, 1816, which provided that "Nothing in this act contained shall be so construed as to contravene any provision of any commercial treaty or convention, concluded between the United States and any foreign power or state. . . ." ⁴⁵ A Revenue Act of March 3, 1883, without specifically referring to commercial treaties, provided that "Nothing in this act shall in any way change or impair the force or effect of any treaty between the United States and any other government . . . so long as such treaty shall remain in force. . . ." ⁴⁶ When, by a subsection of an Act of Oct. 3, 1913, Congress authorized a discount of five percent on duties imposed by the Act if imported goods were carried in American vessels, a proviso directed that "nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation." ⁴⁷ Some statutory provisions of the general type under consideration reach not to "any treaty" but to specified ones. The 1902 Treaty with Cuba ⁴⁸ has frequently been a subject of reference in this connection.⁴⁹ Treaties other than those on commerce and navigation which have been referred to in statutes for the purpose of making clear that their provisions are not intended to be impaired include those dealing with Indian affairs,⁵⁰ seamen,⁵¹

⁴⁴ See, for example, note 30, *supra*.

⁴⁵ 3 Stat. 253.

⁴⁶ 22 Stat. 488, 525-526.

⁴⁷ 38 Stat. 114, 197.

⁴⁸ See, for example, 38 Stat. 114, 192; 42 Stat. 858, 947; 46 Stat. 590, 695; 48 Stat. 943, 944.

⁴⁹ For a statutory statement as to the part of the House of Representatives in changing a rate of duty, see 33 Stat. 3.

⁵⁰ 10 Stat. 172, 173. In this case a proviso made clear that the statute would not be construed to affect the authority of the Government to regulate Indian affairs by treaty or otherwise.

⁵¹ 30 Stat. 755. However, the language in this (1898) legislation on this point ("Provided, That treaties in force between the United States and foreign nations do not conflict") was not included in later (1915) legislation on the subject (38 Stat. 1169).

prize proceedings,⁵² protection of seals,⁵³ postal matters,⁵⁴ export licenses in relation to neutrality,⁵⁵ issuance of bonds,⁵⁶ and inspection of vessels.⁵⁷

The authorization of public action to be performed in such a way as to preserve harmony with treaties may be accomplished in terms somewhat less general than those noted in the preceding paragraph. Thus, early legislation required that before any commission of letters of marque and reprisal could be issued, owners and commanders of vessels should give bond to assure that owners, officers and crew would "observe the treaties . . . of the United States."⁵⁸ The method of authorizing the President to enter into international agreements for tariff reductions was used long before 1934,⁵⁹ but has found special illustration since that time. The plan of the "treaty-merchant" clause of the Immigration Act of 1924, and its broadening to permit rights and privileges not merely under "existing" commercial treaties, but also under those that might be concluded subsequent to the legislation, has been discussed elsewhere.⁶⁰ The application of a discriminatory tonnage duty against France was, by legislation of May 6, 1822, made suspensible at the discretion of the President in the event there should be signature of a treaty of commerce or navigation with the French.⁶¹ Congress has provided that Federal courts shall have cognizance of cases, *inter alia*, arising under treaties made or which shall be made under the authority of the United States.⁶² Directions as to consular functions have in terms been integrated with what treaties may provide,⁶³ and the Anti-Smuggling Act of 1935 was integrated with the so-called "liquor" treaties made in the previous decade.⁶⁴ Other subject-matters in which there are illustrations of the general method are load lines,⁶⁵ foreign-trade zones,⁶⁶ radio,⁶⁷ salvage,⁶⁸ extradition,⁶⁹ rule-making by a claims commission,⁷⁰ and duties of the International Joint Commission (United States-Canada).⁷¹

⁵² 13 Stat. 306, 315.

⁵³ 36 Stat. 326-327.

⁵⁴ 17 Stat. 283, 308.

⁵⁵ 49 Stat. 1081, 1082.

⁵⁶ 54 Stat. 516, 520. By sec. 8, no amendment made by the title was to apply in any case where its application would be contrary to any treaty obligation of the United States.

⁵⁷ 48 Stat. 1889.

⁵⁸ 2 Stat. 759.

⁵⁹ See, for example, 30 Stat. 204-205.

⁶⁰ 43 Stat. 153; 47 Stat. 607-608. See Robert R. Wilson, "'Treaty-Merchant' Clauses in Commercial Treaties of the United States," this JOURNAL, Vol. 44 (1950), pp. 145-149.

⁶¹ 3 Stat. 681.

⁶² 2 Stat. 89; 4 Stat. 164, 165.

⁶³ See, for example, 1 Stat. 254; 9 Stat. 276; 54 Stat. 758.

⁶⁴ 49 Stat. 517, 518, 523.

⁶⁵ In this case (49 Stat. 888), while the legislation was integrated with the treaty of 1930, the Secretary of Commerce was given discretion, as to vessels on the Great Lakes, to vary the loadline marks from those established in the treaty when in his opinion the changes made by him should not be above the actual line of safety.

⁶⁶ 48 Stat. 998, 1001-1002.

⁶⁷ 37 Stat. 302, 307.

⁶⁸ 37 Stat. 242; 54 Stat. 305.

⁶⁹ 9 Stat. 302, 303; 45 Stat. 440, 442.

⁷⁰ See, for example, 4 Stat. 446, 666.

⁷¹ 46 Stat. 1020, 1021.

The Act of June 23, 1938, for the creation of a Civil Aeronautics Authority provided (in Section 1102) that the Authority should exercise its powers and duties "consistently with any . . . treaty, convention or agreement that may be in force between the United States and any foreign country or foreign countries."⁷²

Congress has at various times authorized payments of money, not merely to carry out the provisions of treaties,⁷³ but also to persons entitled to it because of non-observance of a treaty by the United States. Payment may, for example, take the form of refund of tonnage duties,⁷⁴ or of customs duties.⁷⁵

The Constitutional method of terminating a treaty has frequently been the subject of discussion in the United States. Congress has sometimes, as in connection with the Rush-Bagot Agreement,⁷⁶ and the Russian commercial treaty of 1832,⁷⁷ "adopted and ratified" a notice of termination after it has been given by the President. On other occasions Congress has authorized the President to give notice of termination,⁷⁸ or "authorized and directed" him to do so,⁷⁹ or provided in a resolution that he was "charged with the communication" of termination notice.⁸⁰ The legislative body may express its judgment that certain types of treaty provisions "ought to be terminated" and request and direct that notice be given to foreign governments concerned in accordance with the terms of the treaties.⁸¹ On at least one occasion Congress requested that the President open negotiations with a foreign government looking to revival of certain stipulations of an international agreement.⁸²

In the case of certain changes of sovereignty resulting in additions of territory to the United States, legislation has provided that treaties formerly applicable to such territory shall be replaced by treaties of the United States.⁸³ In making law as to the nationality of inhabitants of acquired territory, Congress has sought to harmonize its actions with the requirements of a treaty of peace.⁸⁴

Some language in statutes is directed to the retention of rights already possessed under treaties. For example, the Act of June 15, 1914, amending earlier legislation concerning the Panama Canal, set forth in a proviso that "the passage of this Act shall not be construed or held as a waiver or relinquishment of any right the United States may have under the treaty with Great Britain, ratified the twenty-first of February, nineteen hundred

⁷² 52 Stat. 973, 1026. See also Sec. 602(b), *ibid.*, 1008.

⁷³ See, for example, 11 Stat. 319, 325.

⁷⁵ 9 Stat. 8.

⁷⁷ 37 Stat. 627.

⁷⁹ 41 Stat. 988, 1007.

⁸¹ 38 Stat. 1164, 1184, 1185.

⁸³ See, for example, 30 Stat. 750. Cf. 47 Stat. 761, 768, Sec. 10 (4).

⁸⁴ 31 Stat. 77, 79; 32 Stat. 691, 692.

⁷⁴ 18 Stat. 678; 20 Stat. 171.

⁷⁶ 13 Stat. 568.

⁷⁸ 18 Stat. 287; 36 Stat. 83.

⁸⁰ 13 Stat. 566.

⁸² 22 Stat. 643.

and two, or the treaty with the Republic of Panama, ratified February twenty-sixth, nineteen hundred and four . . . to discriminate in favor of its vessels by exempting the vessels of the United States or its citizens from the payment of tolls . . . or as in any way waiving, impairing or affecting any right of the United States under said treaties or otherwise. . . ."⁸⁵

III

The foregoing would seem to show a fairly common practice of referring in statutes to the standard which is international law, and a much more common practice of integrating statute law with treaty law. The value of this type of evidence is, of course, limited, since it does not reflect instances in which statute-makers have directed their enactments to ends which are consistent with the law of nations and with treaties without making the latter the subject of specific references. Nor does it take into account the cases in which conflicts between, or harmonization of, municipal statutes and international obligations may have been worked out in the realm of diplomacy. In any case, the record seems to suggest that, so far as the United States is concerned, the principle of legality, interpreted broadly and not in a restricted, municipal sense, has figured importantly in certain parts of the law of the land. Without the concession of the reality of international law and of a degree of ascertainability for its provisions, many statutory provisions (including some provisions of the penal law) which incorporate it by reference would not be completely meaningful.

ROBERT R. WILSON

FOURTH MEETING OF CONSULTATION OF MINISTERS OF FOREIGN AFFAIRS OF AMERICAN STATES

The Fourth Meeting of Consultation of Ministers of Foreign Affairs of American States took place in Washington from March 26 to April 7, 1951. This meeting, reasonably successful, again reflected the general world situation, the status of development of the Pan American idea and the crucial problem of the relations, within Pan America, of this country toward Latin America.

The present Pan Americanism, founded in 1889 by the United States, was originally a modest venture on a pragmatist, primarily commercial, basis, whereas, as far as political relations are concerned, this country stood firm on the Monroe Doctrine, and on international isolationism. The United States emerged by 1900 as a great Power politically and economically and entered a period of imperialism *vis-à-vis* Latin America. The first World War interrupted the development and showed also Latin-American suspicions and objections. Practically all Latin-American States joined the

⁸⁵ 38 Stat. 385. Compare 50 Stat. 750, 751.

League of Nations, out of a true universalist feeling and also with the idea to find in Geneva a counterpart against Washington, against what they called the imperialism of the "*colosso del Norte*." Under the impact of our intervention in Nicaragua, which led Raúl Haya de la Torre to found his "*Aprismo*," directed originally against American imperialism, the Sixth Inter-American Conference at Havana in 1928 meant the crisis of the survival of Pan America. Latin-American objections found expression in the many bitter speeches against intervention. That there was no complete crumbling of Pan Americanism, is due only to the great legal and diplomatic gifts of Charles Evans Hughes, Secretary of State, leader of the United States Delegation.

But this country recognized in 1928 that Pan America can survive only as a partnership among equals. The "policy of good will" (1928-1932) under Herbert Hoover led to the present "policy of the good neighbor" under Franklin D. Roosevelt.

Since that time Pan America has developed into a really important regional system. Washington's acceptance of the principle of non-intervention in the internal and external affairs of any American Republic is the very cornerstone of this new policy with which it stands and falls. New organs of co-operation sprang up; a frank recognition of political activities and a full return to the Bolivarian idea of what nowadays is called collective security followed. It was fully recognized that a real and vital Pan Americanism must also be based on far-reaching economic co-operation. Finally, it was understood that such real Pan Americanism must be based, in the very first place, on a mutual knowledge and appreciation of the two great different cultures of the Americas, the Anglo-Saxon and the Hispanic, although much remains to be done in this field.

At the same time, as always, extracontinental dangers from Fascism and National Socialism, the presentiment of the coming second World War, fostered the growth of Pan America. At Buenos Aires the United States introduced the then new idea of Pan American consultation, which was institutionalized at Lima in 1938. After the outbreak of the second World War, there followed quickly the first three Meetings of Consultation: at Panama in 1939, at Havana in 1940, and at Rio de Janeiro in 1942. Then followed a period of retreat, caused by the differences between this country and Argentina, its eternal counterplayer within Pan America, and by this country's absorbing interest, first, to win the war and, then, to prepare the United Nations.

But at Mexico City in 1945 the foundations were laid for a complete reorganization of the inter-American system, making it at the same time a regional organization within the United Nations, and for collective security, by the Pact of Chapultepec. The latter initiative led to the Rio Treaty of

1947,¹ based on Article 51 of the United Nations Charter. The first initiative led to the Bogotá Charter of 1948,² which is now being implemented, and to the Pact of Bogotá³ of the same year.

In 1942 it looked as if the Meeting of Consultation would just become another Inter-American Conference, would lose its character as a special organ, and the Secretary General of the Pan American Union warned against this danger. But the Bogotá Charter, Article 39, made these meetings—apart from their function as the Organ of Consultation under the Rio Treaty—strictly emergency meetings. In accordance with Article 40, the United States in a note of December 18, 1950, to the Chairman of the Council of the Organization of American States asked for the convocation of a Meeting of Consultation and sounded the keynote: "The aggressive policy of International Communism, carried out through its satellites, has brought about a situation in which the entire free world is threatened."

The Council, at its meeting of December 20, 1950, decided to convoke this Meeting of Consultation for March 26, 1951, at Washington. The meeting was carefully prepared by the Pan American Union.⁴ The Council approved the regulations⁵ of the meeting, in accordance with Article 41 of the Bogotá Charter. The meeting was, in conformity with Article 83(a) of the Bogotá Charter, convoked by the Pan American Union and sat at Washington from March 26 to April 7, 1951. The agenda, proposed by the United States and approved by the Council of the Organization, consisted of three problems: (1) political and military co-operation for the defense of the Americas in accordance with . . . the United Nations; (2) strengthening of internal security, and (3) emergency economic co-operation. The meeting appointed three principal committees to consider these three problems, and adopted, without adverse vote, thirty-one resolutions.⁶

The second problem created the least difficulties. Even if democracy in practice leaves something to be desired in many states, there was unanimous agreement, as well as a precedent set, against another type of totalitarianism. Resolution VII deals with the strengthening and effective exercise of democ-

¹ Pan American Union, Cong. and Conf. Series, No. 53; this JOURNAL, Supp., Vol. 43 (1949), p. 53. For a complete analysis of this treaty see Jos. L. Kunz, in this JOURNAL, Vol. 42 (1948), pp. 111-120.

² Department of State Publication 3263 (Int. Org. and Conf. Series II, American Republics 3, November, 1948), p. 166. For an analysis see Jos. L. Kunz, *loc. cit.*, pp. 568-589.

³ Department of State Publication 3263 (cited *supra*), p. 186. For an analysis see Jos. L. Kunz, *Arbitration Journal* (New York), Vol. III (1948), pp. 147-155; and *Österreichische Zeitschrift für öffentliches Recht*, Vol. II (1950), pp. 414-436.

⁴ Handbook, Pan American Union (pp. 253, *mim.*).

⁵ Text in Handbook, pp. 10-16.

⁶ See Final Act, signed at Washington, April 7, 1951 (Pan American Union, Doc. 145, pp. 54, *mim.*; and Doc. C-d-164-E, June 6, 1951); also in Department of State Bulletin, Vol. XXIV, No. 615 (April 16, 1951), pp. 606-615. The major resolutions are also reprinted in the New York Times, April 8, 1951, p. 30.

racism, but, of course, "without prejudice to the principle of non-intervention." It states that the solidarity of the Americas is based on effective exercise of representative democracy, social justice, and respect for and observance of the rights and duties of man. In full harmony with the general trend of the international protection of human rights, it instructed the Inter-American Council of Jurists and the Inter-American Juridical Committee to study these problems and to prepare draft conventions; it also suggested that the Tenth Inter-American Conference take action in this field. Resolution VIII deals with the strengthening of internal security and is similar to the resolutions adopted against subversive activities since 1936. Great care is taken to avoid the abuse of such measures for the purpose of suppressing basic democratic institutions or rights of the individual; Resolution XXI emphasizes that emergency restrictions and control measures shall be considered as merely temporary measures because of the common defense effort.

Much more difficult was the work of Committee I. In his speech¹ of March 26 before the opening session of the meeting, the President of the United States strongly attacked "the aggressive expansion of Soviet power" and underlined the necessity of help for the free men of Europe and measures against the threat in the Far East; he particularly emphasized that the heroic struggle in Korea has the survival of all the principles for which we stand as its basic issue. The address of Secretary of State Dean Acheson² the next day dealt also primarily with the United Nations and Korea. True, the Council of the Organization of American States had adopted a resolution on June 28, 1950, on the North Korean aggression and had declared its "firm adherence to the decisions of the competent organs of the United Nations." In the Meeting of Foreign Ministers, Cuba, Colombia and Uruguay typically were co-sponsors of the American-introduced resolution which stood for firm integration with the United Nations. But representatives of other Latin-American Republics looked at the Organization of American States primarily as a regional organization; the hemispheric, not the global, aspect interested them; they were rather unhappy to see this regional system involved in United Nations affairs and the representatives of Guatemala, Mexico and Argentina said so openly.

This different attitude is quite natural. Notwithstanding all non-intervention and equality, it would be unrealistic to deny that the United States is the strongest and leading Power not only of this Hemisphere, but of the world. The United States' responsibility and, hence, her attitude are therefore by necessity global. It always has been and will be the foreign policy of the United States which shapes the political attitude of the Organization of American States. It was the United States which in 1939 proposed Pan American neutrality, in 1940 Pan American defense, and in 1942 Pan

¹ Text in Department of State Bulletin, Vol. XXIV, No. 614 (April 9, 1951), pp. 566-568.

² *Ibid.*, pp. 569-572.

American belligerency. Now, the United States stands in a global struggle with the Soviet Union. There is, as Ambassador John C. Dreier stated,⁹ "a powerful influence of world events on United States relations with Latin America." On the other hand, as the same speaker stated, Latin America "sees an overwhelming need of improvement of living conditions for their peoples; in the face of their own pressing tasks the problems of Asia and Europe seem remote indeed to many Latin Americans."

But these divergencies could be overcome. In Resolution I ("Declaration of Washington") all the American States express their firm determination to remain steadfastly united, both spiritually and materially, in the present emergency, to maintain not only peace and security and ensure respect for the fundamental freedoms of men in this Hemisphere, but also voice their conviction that strong support of the United Nations is the most effective means of maintaining the peace, security and well-being of the peoples of the world. Resolution II on preparation for defense states that the present world situation requires not only positive support for the collective defense of the Continent, but also co-operation within the United Nations to prevent and suppress aggression in other parts of the world; and that each of the American Republics, "in accordance with its constitutional norms, and to the full extent that . . . its capabilities permit," make available elements of its armed forces "for service as United Nations unit or units. . . ." This resolution was also accepted by Argentina, although its representative made a reservation to the effect "that any use of its national armed forces is conditioned by the National Constitution, which reserves the said authority exclusively and unassignably to the National Congress." Resolution III deals with inter-American military co-operation.

Perhaps still more arduous was the task of Committee III. Here again the quite natural divergency of views between the United States and Latin America was to be seen. The United States was, of course, primarily interested in emergency economic measures, in production of strategic raw materials and in priorities for the requirements of the defense program. The American proposals were introduced by the speech of Assistant Secretary of State Willard L. Thorp, made on March 27 in Committee III.¹⁰ According to him the emergency problems are: to increase the production of basic materials and use them best in the common defense; how to go about the allocation of goods in short supply; how to avoid giving strength to aggressors; how to keep down inflation and maintain our economic stability.

Latin America, on the other hand, wanted security against the peril that their economic requirements become a victim of our defense effort; they stood for guarantees, protecting accrued dollar balances against falling purchasing power in this country; they insisted that long-range economic projects for lifting the living standard of the masses in Latin America and

⁹ *Ibid.*, No. 617 (April 30, 1951), pp. 688-693.

¹⁰ Text *ibid.*, pp. 693-698.

industrialization must not be sacrificed; they rightly stated that these tasks are a pre-condition for political stability, a pre-condition against dangers threatening from Communism, which prospers under conditions of mass poverty, undernourishment and ignorance. Already the address, in response to President Truman's speech, by João Neves de Fontoura, Foreign Minister of Brazil,¹¹ dealt, to a great extent, with economic problems and warned that "we could not repeat past practice without ruining ourselves and with no benefit accruing to the world therefrom."

The great importance of economic problems is reflected in the great number of resolutions adopted. There are the resolutions dealing with emergency problems: increase of production of basic and strategic materials (XIII), production of scarce essential products (XIV), allocations and priorities (XVI), emphasizing the "principle of relative equality of sacrifice"; prices (XVII), destined to prevent inflation; study groups on scarce raw materials (XVIII); transportation (XIX). Resolution XXIII, concerning the shortage and distribution of newsprint, admonishing the states "that governmental measures for the distribution of newsprint must be applied with due regard for the social function of journalism, and without preference or limitation that would affect the freedom of the press," is as near as this meeting could come to the otherwise untouched problem of the Argentine suppression of the leading newspaper, *La Prensa*. On the other hand, Resolutions IX to XII emphasize the necessity of the improvement of the social, economic and cultural levels of the peoples of the Americas, of the economic and social betterment of the working classes, of fighting poverty and ignorance, of the betterment of the American worker and, in general, the necessity of economic development.

It may well be that, despite the resolutions of this meeting, there will not be ideal performances everywhere of a representative democracy; it may well be that, despite the resolutions of this meeting, not many Latin-American soldiers will be seen in Korea. It is certain that the economic resolutions of this meeting will need a strong degree of implementation. Yet, the meeting must be valued as a reasonable success. It has maintained and strengthened the unity of the Americas as a co-operative organization of partners, it has continued the good neighbor policy, it has reaffirmed continental solidarity, and all that in the light of the new world situation now prevailing. Pan America, like everything else, is set in the never-ending flux of history; if it wants to survive, it must adjust itself continuously to the ever-changing circumstances. It is utopian to believe that we are going toward the achievement of some ideal solution which, once reached, will stand forever. Every political work, every enactment of law is a transition; new developments demand new solutions. For, as Justice Oliver Wendell Holmes once remarked: "Repose is not the destiny of man."

JOSEF L. KUNZ

¹¹ Text in the New York Times, March 27, 1951, pp. 10-11.

CURRENT NOTES

DR. ANTONIO SÁNCHEZ DE BUSTAMANTE

Dr. Antonio Sánchez de Bustamante y Sirvén, a giant in the field of international law, passed away at his home in Havana, Cuba, on August 24, 1951, at the age of 86. As a writer, teacher, judge and advocate in matters relating to public and private international law he had attained world prominence.

Dr. Bustamante will be best remembered as the author of the Bustamante Code of Private International Law, a monument in legal history. The difficult subject of conflict of laws has been considered by many authors and in many international conferences, and a number of states have adopted covenants in regard to particular topics. For Latin America an important step was taken at Montevideo in 1889, when draft conventions were prepared to obviate some of the more serious conflicts in civil, commercial and penal matters. The subject continued to occupy the attention of international conferences with a view to codification, and widely divergent opinions became apparent regarding specific points, especially between adherents of the theory of domicile and supporters of the principle of nationality. At length in 1924 the American Institute of International Law appointed a committee of four experts, among whom Dr. Bustamante was the leading spirit. From his vast fund of study and experience he prepared a draft code in which he endeavored to conciliate conflicting views and formulate provisions capable of acceptance both by Latin-American countries and at least partially by the United States. In 1925 he published in Spanish and French his *Proyecto de Código de Derecho Internacional Privado*. It was submitted to the Sixth International Conference of American States held at Havana and approved with modifying amendments by resolution of February 13, 1928, with the official title of "Bustamante Code." It has since been adopted by fifteen Latin-American countries, in most cases with reservations as to specific provisions. The United States could not act on it in view of the powers reserved by our Constitution to the States.

The Code follows the general structural plan of European and Latin-American municipal codes, and, while covering the whole field of law, is nevertheless brief and admirable in its conciseness. It is divided into four Books. Book I relates to civil law, comprising topics of nationality and naturalization, domicile, marriage and divorce, family relations, adoption, guardianship, property, inheritance, wills, contracts, prescription. Book II relates to mercantile law and covers mercantile contracts, companies, bills

of exchange, maritime and aerial commerce. Book III refers to penal laws and questions of jurisdiction. Book IV, relating to procedural law, covers jurisdiction of courts, extradition, letters rogatory, bankruptcy, execution of foreign judgments. Throughout the debates on the Code in Havana and elsewhere many remarkable personal tributes were paid to Dr. Bustamante for his extraordinary achievement. No work can now be written on the subject of private international law without constant and frequent reference to the Bustamante Code.

Dr. Bustamante was born in Havana and raised in a scholastic environment, his father, Manuel Sánchez de Bustamante, being Dean of the University of Havana. He was educated in the Colegio de Belén in Havana and at the Universities of Havana and Madrid. His interest in international law and conflict of laws began early in life; before reaching the age of thirty he had published several studies on international law topics; and in 1896 his first comprehensive book, *Tratado de Derecho Internacional Privado*, appeared in Havana. Engaged in the practice of law, his extraordinary ability soon made him the leader of the Cuban Bar and his lucid and thorough exposition of international law subjects brought him the acclaim of all the other American Republics and of jurists throughout the world.

Cuba took advantage of the talents of her illustrious son. He was elected to the Cuban Senate and served from 1902 to 1918. He was appointed Professor of Law at the University of Havana and continued his lectures until a short time before his death. For a number of years he was Dean of the Law Faculty of the University, and later Honorary Dean. He represented Cuba in many Pan American and other international congresses, was Cuba's delegate to the League of Nations and took his turn as President of that body. After his service as delegate to the Second Hague Conference he was in 1908 appointed Judge of the Permanent Tribunal of Arbitration, and in 1921 he became a Judge of the Permanent Court of International Justice.

At the same time he delivered numerous lectures in Cuba and elsewhere, including lectures at the Academy of International Law of The Hague, at the twentieth meeting of the American Society of International Law in Washington, at Northwestern University, and at the Institute of Citizenship of Emory University in Atlanta. A founder and former President of the Cuban National Academy of Arts and Letters, and for a time President of the Cuban Commission of Intellectual Cooperation, he also served as member of many other bodies, including two international congresses of comparative law. He was a charter member of the American Institute of International Law, and a member of its Executive Council. He founded the *Revista de Derecho Internacional*, the official organ of the Institute, published in Havana under his direction. He was President of the Cuban Society of International Law, and of the International Academy of Comparative Law. He received distinctions from many sources, including honorary degrees

from Columbia University and the University of San Marcos at Lima, Peru, and was elected an honorary member of the American Society of International Law.

Despite Dr. Bustamante's wide range of activities, his indefatigable energy drove him to continuous literary production. In 1908, under the title of *La Segunda Conferencia de la Paz de La Haya*, he published a two-volume summary of the work of The Hague Conference of 1907, which book was also published in a French edition. His faith in the efficacy of international law and international conferences was reflected in an article he wrote for the January, 1908, number of the AMERICAN JOURNAL OF INTERNATIONAL LAW, in which he said: "To be neutral is today the right of all nations, not derived from the consent of the belligerents, but rather imposed upon them absolutely. War is an abnormal condition, occurs at increasingly greater intervals, and is becoming of shorter and shorter duration." All the greater was his disappointment when the desolation of the two World Wars proved his opinion too optimistic. An interesting philosophical discussion of private international law appeared in 1914 under the title of *La Autorquía Personal*. Five volumes of addresses followed between 1915 and 1923, also an explanatory work on *El Tribunal Permanente de Justicia Internacional* in 1925, and another on *El Código de Derecho Internacional Privado y la Sexta Conferencia Panamericana* in 1929. *El Mar Territorial*, a scientific study of territorial seas and riparian rights, appeared in 1930 in Spanish, French and German.

Dr. Bustamante gradually published two final monumental works from 1931 to 1939: *Derecho Internacional Privado*, in three volumes, and *Derecho Internacional Público*, in five volumes. Both of these works disclose exhaustive research and give a masterly presentation of the theoretical and practical aspects of the subjects considered. The author's mode of procedure is frequently first, to establish general principles, then to draw conclusions from them, and then to make comparisons with the actual practices of states. In the work on private international law Volume I contains general and historical statements and a study of nationality and domicile; Volume II covers domestic relations, property, contracts and mercantile law; Volume III relates to penal and procedural law. In the work on public international law, which has also appeared in a French edition, the five volumes bear the respective titles of Constitutional, Administrative, Civil, Penal, and Procedural Public International Law. They contain many passages which arrest attention. Volume I, *Constitutional Law*, considers states as international personalities which are born, live and die. Volume II, *Administrative Law*, gives humanitarian protection first place over property. Volume III, *Civil Law*, compares the field with that of municipal law; under the subdivision of Contracts and Obligations it makes a thorough examination of treaties and international claims. In Volume IV the laws of war and neutrality are classified under *Penal*

Law. Volume V, *Procedural Law*, describes conciliation, arbitration, world court, etc. In later years Dr. Bustamante published a *Manual de Derecho Internacional Privado* and a *Manual de Derecho Internacional Público*, principally for the use of his University students, and likewise a *Proyecto de Código Civil de Cuba*. His last publication, *Derecho Internacional Aéreo*, appeared in 1945.

In his private life Dr. Bustamante's urbane manners and kind and genial disposition rendered him a typical representative of the cultured Cuban gentleman. His conversation was graced by the same simplicity of diction and clearness of statement which characterized his writing, and his personal charm attracted his host of friends as much as his upright character and his vast store of knowledge.

Bustamante will live in history as one of the great paladins of international peace and order. His work and his writings have indelibly inscribed his name in the annals of international law. Upon terminating his great Code of Private International Law he might justifiably have repeated the proud words with which the Roman poet Ovid concluded the *Metamorphoses*:

*Jamque opus exegi, quod nec Jovis ira nec ignis,
Nec poterit ferrum, nec edax abolere vetustas.
Quum volet ille dies, quae nil, nisi corporis hujus
Jus habet, incerti spatium mihi finiat aevi:
Parte tamen meliore mei super alta perennis
Astra ferar, nomenque erit indelebile nostrum.*

OTTO SCHOENRICH

THE ANGLO-IRANIAN OIL COMPANY CASE

It is believed that certain background information will facilitate an understanding of the decision of July 5, 1951, by the International Court of Justice regarding interim measures of protection in the *Anglo-Iranian Oil Company Case*, reprinted *infra*, page 789.¹ The dispute between the United Kingdom and Iran grows out of the unilateral termination by the Iranian Government, as a part of its oil nationalization program, of a concession contract² which entered into force May 29, 1933, between the Government of Iran and the Anglo-Iranian Oil Company, a British corporation in which the British Government holds a large share of the stock.

This concession agreement (generally called the "Convention") was concluded after the termination by the Persian Government of an earlier concession³ held by the company, and a resulting dispute between the United

¹ It is expected that when the Court gives its decision on the merits the full text or a digest will be carried in a future issue of this JOURNAL.

² League of Nations Official Journal, 1933, p. 1653.

³ The D'Arcy concession, granted by the Persian Government May 28, 1901, for a sixty-year term. This concession provided that "any dispute or difference in respect of its interpretation or the rights or responsibilities of one or the other of the parties therefrom resulting" should be submitted to arbitration.

Kingdom and Persia⁴ which was considered by the Council of the League of Nations.⁵ Under the 1933 concession the Government granted to the company

the exclusive right, within the territory of the Concession, to search for and extract petroleum as well as to refine or treat in any other manner and render suitable for commerce the petroleum obtained by it, as well as the non-exclusive right, throughout the whole country,

to transport petroleum, to refine or treat it in any other manner and to render it suitable for commerce, as well as to sell it in Persia and to export it.

In return the company was to pay an annual royalty of four shillings per ton of petroleum sold in Persia or exported, plus a sum of 20% of the distribution to stockholders exceeding £ 671,250 (whether as dividends or reserves), with the proviso that the amount paid under these clauses should never be less than £ 750,000 per year. Sizeable payments were also to be made in lieu of taxes. Article 21 of the concession provided:

The contracting parties declare that they base the performance of the present Agreement on principles of mutual goodwill and good faith as well as on a reasonable interpretation of this Agreement.

.

This Concession shall not be annulled by the Government and the terms therein contained shall not be altered either by general or special legislation in the future, or by administrative measures or any other acts whatever of the executive authorities.

Article 22 provided for arbitration of any disputes, each party appointing an arbitrator and the two arbitrators agreeing on an umpire. If they could not agree within two months, an umpire was to be named by the President of the Permanent Court of International Justice⁶ on the request of either party. If either party failed to appoint an arbitrator within sixty days of

⁴ No legal difficulties arose from the change in name of the state from "Persia" to "Iran," or in the corresponding change in the name of the company from "Anglo-Persian" to "Anglo-Iranian."

⁵ Following controversies as to the proper royalty to be paid Persia by the concessionary company, the Persian Government canceled the D'Arcy concession on Nov. 27, 1932. Protests and requests for arbitration by the company were unsuccessful. The United Kingdom submitted the dispute to the Council of the League of Nations by letter of Dec. 14, 1932 (League of Nations Official Journal, 1932, p. 2296), and memorandum of Dec. 19 (*ibid.*, p. 2298). The Persian Government replied in a memorandum of Jan. 18, 1933 (League of Nations Official Journal, 1933, p. 289). After argument by British and Persian representatives (*ibid.*, pp. 197-211), the League Council suspended proceedings until the parties might have an opportunity to work out a solution for themselves (*ibid.*, p. 252). After the new concession resulted from direct negotiations between the company and the Persian Government, the League Council expressed its pleasure that the dispute was settled (*ibid.*, pp. 827, 1606).

⁶ If the President were a national of either party, then the Vice President of the Court was to act instead.

having received notice of the request for arbitration, the other party was given the right to ask the President of the Court to nominate a sole arbitrator, who should settle the dispute. Arbitration was to be in accordance with the procedure followed by the Permanent Court of International Justice at the time of the arbitration, and the award to be "based on the juridical principles contained in Article 38 of the Statute" of the Court. As for the scope of this obligation to arbitrate, the concession provided in Article 22 that:

Any differences between the parties of any nature whatever and in particular any differences arising out of the interpretation of this Agreement and of the rights and obligations therein contained as well as any differences of opinion which may arise relative to questions for the settlement of which, by the terms of this Agreement, the agreement of both parties is necessary, shall be settled by arbitration.

Article 26 specified that:

This Concession is granted to the Company for the period beginning on the date of its coming into force and ending on December 31st, 1993.

Before the date of December 31st, 1993, this Concession can only come to an end in the case that the Company should surrender the Concession (Article 25)⁷ or in the case that the Arbitration Court should declare the Concession annulled as a consequence of default of the Company in the performance of the present Agreement.

The following cases only shall be regarded as default in that sense: (a) If any sum awarded to Persia by the Arbitration Court has not been paid within one month of the date of the award; (b) If the voluntary or compulsory liquidation of the Company be decided upon.

In any other cases of breach of the present Agreement by one party or the other, the Arbitration Court shall establish the responsibilities and determine their consequences.

In March, 1951, the Iranian Majlis and Senate approved a Single Article enunciating the principle of nationalization of the oil industry in Iran, which received the Imperial assent on May 1, 1951. This was implemented by the Iranian Oil Nationalization Law of May 1, 1951,⁸ providing for a board of five Senators, five Deputies, and the Iranian Minister of Finance, under whose supervision immediate nationalization and dispossession of the Anglo-Iranian Oil Company was to be carried out. This Act declared that from March 20, 1951, "the entire revenue derived from oil and its products is indisputably due to the Persian nation." Under the supervision of the Board, "the Government is bound to examine the rightful claims of the Government as well as the rightful claims of the Company," and to submit its suggestions to the Iranian Parliament.

⁷ Art. 25 provided that "The Company shall have the right to surrender this Concession at the end of any Christian calendar year, on giving to the Government notice in writing two years previously."

⁸ English translation in Application Instituting Proceedings, Anglo-Iranian Oil Company Case, p. 58 (Annex C).

On May 8, 1951, the Anglo-Iranian Oil Company wrote to the Prime Minister of Iran, protesting this attempt to annul the concession, requesting arbitration under Article 22, and naming the company's arbitrator. On May 20 the Iranian Minister of Finance replied,⁹ rejecting the proposal for arbitration and saying that

First: The nationalization of industries is based on the right of the sovereignty of nations, such as exercised by other governments, including the British Government itself and the Mexican Government in different cases.

Second: A private agreement cannot obstruct the enforcement of this right, which is based on the principles of international rights.¹⁰

Third: The nationalization of the oil industry, which is based on the enforcement of the right of sovereignty of the Persian people, is not subject to arbitration, and no international authority is qualified to investigate this matter.

Attempts to reach a friendly settlement through diplomatic channels between the United Kingdom and Iran were not successful, and despite the assistance of Mr. W. A. Harriman, sent as a special representative by President Truman, no settlement of the controversy has been reached.

On May 26, 1951, the United Kingdom transmitted to the International Court of Justice its *Application Instituting Proceedings in the Anglo-Iranian Oil Company Case*.¹¹ In this application the Court was asked:

(a) To declare that the Imperial Government of Iran are under a duty to submit the dispute between themselves and the Anglo-Iranian Oil Company, Limited, to arbitration under the provisions of Article 22 of the Convention concluded on the 29th April, 1933, between the Imperial Government of Persia and the Anglo-Persian Oil Company, Limited, and to accept and carry out any award issued as a result of such arbitration.

(b) Alternatively,

(i) To declare that the putting into effect of the Iranian Oil Nationalization Act of the 1st May, 1951, in so far as it purports to effect a unilateral annulment, or alteration of the terms, of the Convention concluded on the 29th April, 1933, between the Imperial Government of Persia and the Anglo-Persian Oil Company, Limited, contrary to Articles 21 and 26 thereof, would be an act contrary to international law for which the Imperial Government of Iran would be internationally responsible;

(ii) To declare that Article 22 of the aforesaid Convention continues to be legally binding on the Imperial Government of Iran and that, by denying to the Anglo-Iranian Oil Company, Limited, the exclusive legal remedy provided in Article 22 of the aforesaid Convention, the Imperial Government have committed a denial of justice contrary to international law;

⁹ English translation, *ibid.*, p. 66.

¹⁰ Thus in the translation; it is believed that "international law" may express what was intended.

¹¹ Published by the International Court of Justice, 1951, General List, No. 16.

(iii) To declare that the aforesaid Convention cannot lawfully be annulled, or its terms altered, by the Imperial Government of Iran, otherwise than as the result of agreement with the Anglo-Iranian Oil Company, Limited, or under the conditions provided in Article 26 of the Convention;

(iv) To adjudge that the Imperial Government of Iran should give full satisfaction and indemnity for all acts committed in relation to the Anglo-Iranian Oil Company, Limited, which are contrary to international law or the aforesaid Convention, and to determine the manner of such satisfaction and indemnity.

In submitting its case, the United Kingdom claimed that the Iranian Government was not entitled to refuse to submit its dispute with the Anglo-Iranian Co. to arbitration under Article 22; that the unilateral annulment of the concession was contrary to Articles 21 and 26; that "in so purporting to effect a unilateral annulment" the Iranian Government committed a wrong against the company, a British national; that in rejecting arbitration the Iranian Government denied "to the Company the exclusive legal remedy expressly provided for" in the concession; that in annulling the concession and denying arbitration the Iranian Government was "responsible for a denial of justice against a British national"; and that by such action the Government of Iran has "treated a British national in a manner not in accordance with the principles of international law and have, in consequence, committed an international wrong against the Government of the United Kingdom."

The British application stated that the jurisdiction of the Court was based on the acceptance by both Iran and the United Kingdom of the Optional Clause,¹² pointing out that under a declaration deposited with the Secretariat of the League of Nations September 19, 1932,¹³ Persia had accepted the jurisdiction of the Court, *ipso facto* and without special agreement, *vis-à-vis* any other state accepting the same obligation,

¹² Art. 36, par. 2, of the Statute of the International Court of Justice (this JOURNAL, Vol. 39 (1945), Supp., p. 215) reads:

"The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation."

¹³ Seventh Annual Report of the Permanent Court of International Justice, P.C.I.J. Series E, No. 7, p. 465. See also International Court of Justice Yearbook, 1946-1947, p. 211. Art. 36, par. 5, of the Statute of the International Court of Justice provides: "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

in any disputes arising after the ratification of the present declaration with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration, with the exception of:

(a) disputes relating to the territorial status of Persia, including those concerning the rights of sovereignty of Persia over its islands and ports;

(b) disputes in regard to which the Parties have agreed or shall agree to have recourse to some other method of peaceful settlement;

(c) disputes with regard to questions which, by international law, fall exclusively within the jurisdiction of Persia.¹⁴

The British contention that the dispute falls within the declaration accepting the Optional Clause rests on three grounds. In the first place, the United Kingdom points to an exchange of notes between the British and Persian Governments on May 10, 1928, in connection with the abolition of extraterritoriality in Persia, in which Persia undertook that British nationals "will be admitted and treated on Persian territory in conformity with the rules and practice of international law." Secondly, the British Government asserted that treaties of 1857 and 1903 between Persia and the United Kingdom provided that British nationals should receive most-favored-nation treatment in Persia, and that Iran undertook in bilateral treaties (and exchanges of notes) with Egypt, Belgium, Czechoslovakia, Denmark, Switzerland, Germany, Turkey, the United States, The Netherlands, and Italy, between 1928 and 1937, to treat the nationals of the other party to the agreement in accordance with the principles of international law. Thirdly, the argument was made that

the Convention concluded in 1933, by which the Concession was granted, may, having regard to the circumstances in which it was made, be held to be a "convention" within the meaning of that expression in the declaration deposited by the Imperial Government of Persia relating to Article 36(2) of the Statute of the Court.

WM. W. BISHOP, JR.

¹⁴ English translation by League of Nations Secretariat. The official French text reads:

"Le Gouvernement impérial de Perse déclare reconnaître comme obligatoire, de plein droit et sans convention spéciale, vis-à-vis de tout autre État acceptant la même obligation, c'est-à-dire sous condition de réciprocité, la juridiction de la Cour permanente de Justice internationale, conformément à l'article 36, paragraphe 2, du Statut de la Cour, sur tous les différends qui s'élèveraient après la ratification de la présente déclaration, au sujet de situations ou de faits ayant directement ou indirectement trait à l'application des traités ou conventions acceptés par la Perse et postérieurs à la ratification de cette déclaration, exception faite pour:

"a) les différends ayant trait au statut territorial de la Perse, y compris ceux relatifs à ses droits de souveraineté sur ses îles et ports;

"b) les différends au sujet desquels les Parties auraient convenu ou conviendraient d'avoir recours à un autre mode de règlement pacifique;

"c) les différends relatifs à des questions qui, d'après le droit international, relèveraient exclusivement de la juridiction de la Perse."

THE COLOMBIAN-PERUVIAN ASYLUM CASE: TERMINATION OF THE JUDICIAL PHASE

For two and a half years, Colombia and Peru have engaged in a controversy regarding the status as a political offender and the ultimate disposition of Víctor Raúl Haya de la Torre, long-time chief of the leftist *Alianza Popular Revolucionaria Americana* (APRA), who was granted asylum in the Colombian Embassy at Lima on January 3, 1949. Several months of fruitless diplomatic negotiation between the parties were followed by their submission of the case to the International Court of Justice which, in turn, has dealt with various aspects of the matter in the course of three successive judgments.¹

In its judgment of November 20, 1950,² the Court held that Colombia's unilateral qualification of Haya de la Torre as a political offender was not binding on Peru; that Peru was not obliged to issue a safe-conduct to the fugitive; that Peru had not proved the fugitive to be other than a political offender; and, finally, that diplomatic asylum should be granted only under conditions of urgency which had not been shown to exist in the case of Haya de la Torre.³ While the Court had answered the questions raised by the parties, the real issue of whether Colombia was bound to surrender Haya de la Torre to Peru remained unanswered, for it had not been directly submitted to the Court by either state. Immediately after the first judgment was rendered, Colombia sought to have it interpreted in terms of this issue.⁴ On November 27, the Court dismissed the Colombian request on the grounds that an interpretation cannot be made regarding a point which was not raised in the original submissions of the parties, nor can such action be initiated unless the parties are in disagreement regarding the judgment.⁵

The Court's decisions of November 20 and 27 contributed little by way of settling the controversy in a manner satisfactory to the parties.⁶ On December 13, Colombia filed an application with the Court, initiating a new proceeding which would deal specifically with the issue of the disposition of Haya de la Torre.⁷ In a letter of January 22, 1951, the Colombian Agent

¹ For the background of the case and a discussion of the first and second judgments which were rendered by the Court on November 20 and 27, 1950, see Manley O. Hudson, "The Twenty-Ninth Year of the World Court," this JOURNAL, Vol. 45 (1951), pp. 19-27. See also L. C. Green's note on the case in *International Law Quarterly*, Vol. 4 (1951), pp. 229-239.

² *Asylum Case (Colombia/Peru)*, I.C.J. Reports, 1950, p. 266; this JOURNAL, Vol. 45 (1951), p. 179.

³ I. C. J. Reports, 1950, pp. 287-288.

⁴ *Ibid.*, p. 399.

⁵ *Ibid.*, p. 395, at p. 403.

⁶ See notes exchanged by Peru and Colombia on Nov. 28, Dec. 6, and Dec. 14, 1950, *Revista Peruana de Derecho Internacional*, Vol. 10 (Sept.-Dec. 1950), pp. 233 *et seq.*

⁷ Peru agreed to the new proceeding on Dec. 26. Haya de la Torre Case, Order of January 3rd, 1951, I.C.J. Reports, 1951, p. 4. The jurisdiction of the Court for this proceeding was based on Arts. 36 and 37 of the Statute of the Court and on Art. 7 of the 1934 Protocol of Friendship and Co-operation between Colombia and Peru. 164

asked leave to include in this application a reference to the Convention on the Right of Asylum which was signed at the Sixth Pan American Conference held at Havana in 1928.⁸ At the same time, Colombia requested that the Registrar of the Court, acting in accordance with Article 63 of the Statute, circularize all parties to the convention in an effort to ascertain their views regarding its interpretation. On February 15 Cuba replied with a statement of its views on the convention and in regard to asylum in general.⁹ The admissibility of the Cuban intervention was challenged by Peru on the grounds of its timing and its amounting to an appeal against the first judgment of the Court.¹⁰ The Court was inclined to consider that the memorandum which Cuba had submitted with its declaration of intervention was mainly concerned with questions which had been decided in the first judgment and which were, consequently, not a proper basis for intervention; but Cuba replied that the new case introduced an aspect of the Havana Convention which had not been considered in the original case. Within these limits, the President of the Court ruled that Cuba's intervention could be sustained under Article 63 of the Statute.¹¹

At the end of the written proceedings, Colombia requested the Court:

To state in what manner the Judgment of November 20th, 1950, shall be executed by Colombia and Peru, and furthermore, to adjudge and declare that Colombia is not bound, in execution of the said Judgment of November 20th, 1950, to deliver M. Víctor Raúl Haya de la Torre to the Peruvian authorities.

In the event of the Court not delivering judgment on the foregoing Submission, may it please the Court to adjudge and declare, in the exercise of its ordinary competence, that Colombia is not bound to

League of Nations Treaty Series 22. In the face of the unwillingness of the parties to reach an amicable settlement of the controversy, the United States ventured to offer its good offices. The New York Times, Dec. 2, 1950, 6: 7. The Organization of American States was asked by Guatemala to include the " 'Reaffirmation of the Right of Asylum as an American juridical principle' " on the agenda of the Fourth Meeting of Consultation of Foreign Ministers to be held in Washington in March, 1951. While the Council was sympathetic to this suggestion, it decided that the topic was not a factor in the emergency situation giving rise to this meeting of Foreign Ministers. In a resolution, the Council recommended that the Inter-American Juridical Committee "give preferential attention to the study of the topic of the regimen of political asylees, exiles, and refugees." Council of the Organization of American States, Decisions Taken at the Meeting Held on February 14, 1951, pp. 25-26.

⁸ 132 League of Nations Treaty Series 323; this JOURNAL, Supp., Vol. 22 (1928), p. 158.

⁹ The Cuban letter constituted a declaration of intervention under Art. 66, par. 1, of the Rules of the Court. Haya de la Torre Case, Judgment of June 13th, 1951, I.C.J. Reports, 1951, pp. 72-74.

¹⁰ It may be noted that Peru severed diplomatic relations with Cuba in August, 1949, over the issue of diplomatic asylum granted in the Cuban Embassy at Lima to two *Apristas* who subsequently escaped to Havana. International Court of Justice, Haya de la Torre Case (Colombia/Peru) Pleadings (May, 1951), pp. 3-5.

¹¹ Pleadings, p. 17; I.C.J. Reports, 1951, pp. 76-77; this JOURNAL, pp. 782-783.

deliver the politically accused M. Víctor Raúl Haya de la Torre to the Peruvian authorities.¹²

In the Peruvian counter-memorial, the Court was asked:

I. To state in what manner the Judgment of November 20th, 1950, shall be executed by Colombia;

II. To dismiss the Submissions of Colombia by which the Court is asked to state solely [*"sans plus"*] that Colombia is not bound to deliver Víctor Raúl Haya de la Torre to the Peruvian authorities;

III. In the event of the Court not delivering judgment on Submission No. I, to adjudge and declare that the asylum granted to Señor Víctor Raúl Haya de la Torre on January 3rd, 1949, and maintained since that date, having been judged to be contrary to Article 2, paragraph 2, of the Havana Convention of 1928, ought to have ceased immediately after the delivery of the Judgment of November 20th, 1950, and must in any case cease forthwith in order that Peruvian justice may resume its normal course which has been suspended.¹³

The Cuban intervention concerned the problem of the surrender of a political refugee. It was pointed out that while there is no provision in the Havana Convention for the surrender of such a person, the convention is quite explicit in regard to the surrender of the common criminal to local authorities. Nor is there any provision for sanctions in event that a state grants diplomatic asylum in violation of the conditions established in the convention.

L'inviolabilité de la personne placée sous le bénéfice de l'asile diplomatique est peut-être le principe le plus respecté de ceux qui découlent de l'institution de l'asile et il est l'un de ceux qui tirent leur force de la coutume internationale. C'est en effet avec le sentiment de remplir un devoir juridique que les États s'abstiennent de demander la remise d'un asilé diplomatique. C'est avec le sentiment qu'un État saisi d'une demande pareille se refuserait à mettre l'asilé politique dans les mains de l'État territorial.¹⁴

Once asylum has been granted to the political offender, it must be respected by the territorial state until it is terminated, a process which, according to Cuba, can take place only at the will of the fugitive himself, by reason

¹² I.C.J. Reports, 1951, p. 75.

¹³ *Ibid.* In consideration of the Peruvian counter-memorial, an addition was made to the Colombian submission on May 16, 1951, the Court being requested:

"To state in what manner the Judgment of November 20th, 1950, shall be executed by Colombia, when stating, in accordance with the first point of our principal claim, 'in what manner the Judgment of November 20th, 1950, shall be executed by Colombia and Peru';

"On Submission II of the same Counter-Memorial: To reject it;

"And, should occasion arise, to reject Submission III of the said Counter-Memorial."

Ibid., p. 76.

The *ad hoc* judges again were José Joaquín Caicedo Castilla for Colombia and Luis Alayza y Paz Soldán for Peru. I.C.J. Communiqué No. 51/3 (unofficial), Feb. 9, 1951.

¹⁴ Pleadings, pp. 39, 40.

of his death, or in event of his departure from the country under a safe-conduct.¹⁵

On June 13, 1951, the Court gave its third judgment in the *Colombian-Peruvian Asylum Case*.¹⁶ The first part of the principal submission of Colombia and the first submission of Peru were both rejected by unanimous vote. The Court pointed out that in the first proceeding it had been concerned only with "defining legal relations" between the parties as established by the Havana Convention.

... The interrogative form in which they have formulated their Submissions [in the present proceeding] shows that they desire that the Court should make a choice amongst the various courses by which the asylum may be terminated. But these courses are conditioned by facts and by possibilities which, to a very large extent, the Parties are alone in a position to appreciate. A choice amongst them could not be based on legal considerations, but only on considerations of practicability or of political expediency; it is not part of the Court's judicial function to make such a choice.¹⁷

In regard to the second part of Colombia's principal submission in which the Court was asked to rule whether Haya de la Torre should be surrendered "in execution of the Judgment of November 20th," the Court took the view that as the issue of surrender had not been raised in the first case, it could not be treated in such terms in this case.¹⁸ The same issue, however, was raised in the alternative submission of Colombia, being phrased so that the Court was asked to decide the point "in the exercise of its ordinary competence" rather than in terms of the first judgment. By a vote of 13 to 1, the Court sustained the Colombian argument that, as the asylum state, Colombia was not bound to surrender Haya de la Torre to the Peruvian authorities. The Court noted that under the Havana Convention, diplomatic asylum is understood to provide the political offender with a temporary shelter during which time he must make other arrangements to secure his safety. The convention provides only one method for the termination of such asylum, *i.e.*, by the departure of the fugitive from the country under a safe-conduct. In the Haya de la Torre affair, however, the Court had held, in the first judgment, that such safe-conduct can be demanded from the territorial state only "if the asylum has been regularly granted and maintained and if the territorial State has required that the refugee should be sent out of the country."¹⁹ But where the asylum has been granted irregularly and where the territorial state has not required the departure of the fugitive, as in the present case, the Court found that the convention was silent as to the action to be taken. This silence, in the Court's opinion,

¹⁵ *Ibid.*

¹⁶ I.C.J. Reports, 1951, p. 71; this JOURNAL, p. 781.

¹⁷ I.C.J. Reports, 1951, p. 79.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, p. 80.

could not be regarded, however, as imposing a duty on Colombia to surrender Haya de la Torre.

. . . Such an interpretation would be repugnant to the spirit which animated that Convention in conformity with the Latin-American tradition in regard to asylum, a tradition in accordance with which political refugees should not be surrendered. There is nothing in that tradition to indicate that an exception should be made where asylum has been irregularly granted. If it had been intended to abandon that tradition, an express provision to that effect would have been needed, and the Havana Convention contains no such provision. The silence of the Convention implies that it was intended to leave the adjustment of the consequences of this situation to decisions inspired by considerations of convenience or of simple political expediency. To infer from this silence that there is an obligation to surrender a person to whom asylum has been irregularly granted would be to disregard both the rôle of these extra-legal factors in the development of asylum in Latin America, and the spirit of the Havana Convention itself.²⁰

While the Court would not depart from its view, expressed in the decision of November 20, that "in principle, asylum cannot be opposed to the operation of justice," and thus that the head of a diplomatic mission is under an obligation to respect the administration of law in the territorial state, the Court did take the position that even where asylum has been irregularly granted, the asylum state is under no obligation to "render positive assistance" to the authorities of the territorial state in their prosecution of justice by surrendering a political offender to them. In the instant case, not only would such action be inadmissible in the absence of an express provision in the Havana Convention but also it "would exceed the first decision."²¹ It was also pointed out that Peru had not been able to prove in the first proceeding that Haya de la Torre was a common criminal; as far as *surrender* was concerned, then, Colombia's position must be upheld.²²

In regard to the third submission of Peru, by unanimous vote the Court agreed that the asylum must cease immediately because it had been granted irregularly. Peru could properly demand the termination of a situation which had been established in violation of the terms of the Havana Convention, and Colombia would be "bound to terminate it." It was to be understood, however, that this decision was not reached in order to insure that "Peruvian justice may resume its normal course" because, said the Court, this phrase "appears to involve, indirectly, a claim for the surrender of the refugee," a claim which had been previously denied.²³

Reviewing the results of the judgment, it would seem, then, that while the asylum should terminate immediately, Colombia was under no obligation to surrender Haya de la Torre. Lest a contradiction be thought apparent here, the Court hastened to point out that "surrender is not the only way of

²⁰ *Ibid.*, p. 81.

²² *Ibid.*, pp. 81-82.

²¹ *Ibid.*

²³ *Ibid.*, p. 82.

terminating asylum."²⁴ As to what other possible ways of termination might exist, the Court must needs be silent, for such "practical advice" would be beyond the scope of the judicial function of the Court. The Court concluded that

... it can be assumed that the Parties, now that their mutual legal relations have been made clear, will be able to find a practical and satisfactory solution by seeking guidance from those considerations of courtesy and good-neighbourliness which, in matters of asylum, have always held a prominent place in the relations between the Latin-American republics.²⁵

This final statement embodies a suggestion that Colombia and Peru resort to the diplomatic channel in order to seek a termination of their dispute, a procedure which they have indicated that they are willing to consider.²⁶

CONCLUSION

After two and a half years of diplomatic negotiations and judicial proceedings, it may be asked whether the results to date in the *Colombian-Peruvian Asylum Case* are conclusive as far as international law is concerned. Several points emerge from the judgments of the International Court of Justice:

1. *Qualification*: An asylum state's unilateral qualification of a fugitive as a political offender is not binding upon the territorial state but may be accepted by the latter at its discretion. In a denial of such unilateral qualification, the burden of proof rests upon the territorial state.

2. *Grant of diplomatic asylum*: Diplomatic asylum is granted under conditions of urgency in order to secure the safety of the fugitive. It must terminate as soon as the fugitive can make other arrangements for his protection. Diplomatic asylum which is granted in violation of the pertinent provisions of the Havana Convention must cease immediately such finding has been made.

3. *Termination*: Diplomatic asylum is terminated by the issuance of a safe-conduct by the territorial state to the political offender. The safe-conduct issues at the discretion of the territorial state. The asylum state is under no obligation to terminate asylum, however granted, by surrendering the fugitive to the territorial state. Diplomatic asylum which has been irregularly granted must be terminated by negotiation between the parties.

4. *Judicial action*: While the International Court of Justice will decide the legal relations between the parties in dispute over a grant of diplomatic

²⁴ *Ibid.*

²⁵ *Ibid.*, p. 83.

²⁶ The New York Times, July 15, 1951, 20: 4. According to a despatch from Bogotá of Aug. 4, unofficial sources indicated that Colombia would soon send an ambassador to Peru for the purpose of carrying on negotiations regarding Haya de la Torre. *La Razón*, La Paz, Aug. 5, 1951, 1: 7.

asylum, any practical solution to the problem must come through the diplomatic channel.

These points may be of some interest to the states upon which the Havana Convention on the Right of Asylum is binding, for these points result from the Court's analysis and interpretation of the pertinent provisions of that convention.

The main point which emerges, however, is not novel. Asylum in any of its forms, whether it be granted in an embassy, a warship, military aircraft, or in foreign territory, constitutes a "political" problem. Considerations of "convenience," "political expediency," as well as humanitarianism motivate grants of asylum; nowhere is this more true than in regard to diplomatic asylum. By returning the present dispute to the parties for final settlement, the International Court of Justice confirms the position generally maintained by governments and publicists outside Latin America that diplomatic asylum has no place in international law. As a form of intervention and a misuse of diplomatic immunity, the practice contradicts two established principles of international law. Where recognition of continued resort to the practice has given rise to attempts to regularize it by treaty, the results have been regional in scope, and within that region not always widely accepted. But for all its doubtful status, the practice cannot be written off as a regional aberration of slight consequence so long as states are prey to conditions which make resort to diplomatic asylum of more than academic interest; attempts to regularize diplomatic asylum through treaty will be necessary until the need for the practice has disappeared. The judgments in the *Colombian-Peruvian Asylum Case* indicate some points which might be considered in a revision of the Havana Convention.

One other consideration which has been brought forward in regard to the Colombian-Peruvian dispute is that the Latin-American States may be discouraged from submitting their controversies to judicial settlement in the future on the grounds that the International Court of Justice has displayed less understanding of the realities of diplomatic asylum in Latin America than it might have.²⁷ A reading of the first judgment would suggest that the Court was more concerned with a strict interpretation of the Havana Convention than with exploring the limits of regional international law, even though the chief exponent of the latter concept, Alejandro Alvarez, is a member of the Court. The third judgment, however, displays somewhat more recognition of the practical problem of diplomatic asylum, if only in the Court's returning of the issue to the parties for final settlement in terms of conditions of which they are the best judges. The Latin-

²⁷ See the letter of Dr. Eduardo Zuleta Angel to the New York Times, Nov. 22, 1950, 24: 6; see also the comment of L. C. Green in *International Law Quarterly*, Vol. 4 (1951), pp. 238-239.

American States have long been proponents of pacific settlement of disputes. While no dispute between two Latin-American States has previously been heard in the International Court of Justice,²⁸ the fact that so sensitive a "political question" as that involved in the Haya de la Torre affair should have been submitted at all is an encouraging demonstration of the continued belief of these states in the process of pacific settlement.

ALONA E. EVANS

SOVIET COMMENTS ON INTERNATIONAL LAW

The postwar cultural isolationism towards the West and a specifically Soviet complex of inferiority inherited from the early years of the regime have produced since the last war an attitude of self-assertion. This somehow childish attitude is expressed, among others, by a frenzy of claims to Russian priorities not only in regard to technological inventions, but also in respect to the learned theories. The Soviet scholars seem to forget that the priority of a thinker in stating a concept, though important in itself, does not reduce another's merit of fully developing a new concept in all its intellectual aspects; moreover, the importance of an intellectual must also be measured by the actual influence he exerted upon his contemporaries and the succeeding generations. A Russian writer may have preceded Bodin in formulating the idea of the state supreme power, but this does not alter the fact that Bodin was the first to establish a fully developed theory of sovereignty, nor does it diminish the Frenchman's influence upon many generations. However, this Soviet frenzy of claiming priorities may have one beneficial result, namely, it might enrich our knowledge of the older Russian thought. The West is fairly familiar with some Russian thinkers of the nineteenth and twentieth centuries, but knows next to nothing concerning their predecessors. This is why one may read with interest V. I. Zuev's article: "The Priority of Russian Juristic Thought in the Establishment and Development of the Theory of Sovereignty" (*Sovetskoe Gosudarstvo i Pravo*, No. 3, March, 1951, pp. 24-37). This article presents another interest as well: It illustrates the Soviet opposition to the contemporary Western tendency to get rid of the encumbering dogma of state sovereignty; the concept of state sovereignty provides a theoretical basis for Soviet foreign policy, especially within the United Nations, and supplies the necessary arguments for denying the superiority of international law over municipal law:

The camp of imperialism and reaction headed by the USA plays the role of the gravedigger of the sovereignty of peoples, nations and

²⁸ The Permanent Court of International Justice was given jurisdiction in the Bolivian-Paraguayan dispute over the Chaco and in the Colombian-Peruvian dispute over Leticia, but neither case was adjudicated. Manley O. Hudson, *International Tribunals, Past and Future* (Washington, 1944), p. 141.

States; the camp of socialism and democracy headed by the USSR acts as a defender of the sovereignty of peoples, nations and States. (p. 14.)

One may wonder whether the satellite peoples and nations would agree with this bold statement.

While we believe in the West that the doctrine of sovereignty was the theoretical result of the creation of centralized, national states and marked an end of the feudal political conceptions, the Soviet authors claim since the war that sovereignty is the necessary attribute of each state—ancient, medieval and modern: "State sovereignty appeared simultaneously with the appearance of the State and law, and represents an attribute of the State power, all through the whole history of the State and law." (p. 12.) Sovereignty is understood in its fullest, etymological sense; the author quotes Mr. A. Ya. Vyshinskii's definition:

. . . it is the substance of the independence of a given state authority of any other authority both within and without the boundaries of that State. (p. 14.)

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The theory of sovereignty was created in Russia earlier than in many other countries and was embodied in the doctrine of the autocracy of Moscow sovereigns. This testifies to the high development of the national culture of the great Russian nation which played throughout many centuries an important and at times even a decisive rôle in the international life of Europe. (p. 15.)

In order to establish the priority of the Russian doctrine the Soviet author quotes from the writings of Joseph Sanin (1439–1515), who formulated the doctrine of the Muscovite autocracy in his book, *The Teacher*, published in 1515 (sixty-one years before Bodin's *Six Books on the Republic*). It is interesting to note on the margin how often political events bring forth their *ex post* explanation and justification by a corresponding doctrine; the Muscovite centralized state was established in the fifteenth century, and Sanin supplied it with a theory which reminds one even more of King James than of Bodin. "The Tsar," writes Sanin, "resembles by his power the Supreme God." "The supreme authority of the Tsar," summarizes Mr. V. I. Zuev, "is unlimited and does not depend on anyone but God. In regard to his subjects the Tsar is god, and the judgment over this earthly god may not and should not belong to men." (p. 15.) Sanin's Tsar, like King James, felt at least responsible to God and His divine law; this much cannot be said about the contemporary totalitarian leaders. "Joseph Sanin raises the Tsarist authority above those of the feudal princes and of the Church." (p. 15.) Sanin advised the princes in the following words: ". . . to love with all their hearts the God-given Tsar, to show him humility and obedience, and to act according to his will and command as though working for

God, not for a man." God gave the Tsar full power, including power over the Church and the monastic orders.

Sanin was followed in the same century by others, including Ivan the Terrible. The Moscow Tsars asserted the same doctrine in regard to foreign sovereigns, claiming full independence and equality of rank. Ivan III's envoy sent such a missive in 1489 to Emperor Frederic III: "Our sovereign is a great sovereign descending from the ancestors who in time immemorial enjoyed the friendship and love of the foremost Roman emperors who had abandoned Rome to the Pope and had reigned themselves in Byzantium." This was an indirect denial of the claim of Charlemagne and his successors to be the heirs of the Western Roman Empire. This same view is reflected by the Soviet scholars when they say that Russia did not need any Renaissance, because she received from Byzantium the uninterrupted tradition of the ancient heritage.

A contemporary of Catherine the Great, M. V. Lomonosov who is extolled in present-day Russia "... developed [in his *Russian History*] the idea that autocratic state power as an independent power may and should overcome the backwardness of Russia." (p. 28.) Those few quotations explain the nature of the political heritage of the present rulers of Russia. They have not been separated from the impact of that heritage by any events comparable to the two English or the French Revolutions. One cannot be surprised too much at the Central Committee of the Soviet Communist Party praising highly in a resolution of September 4, 1946, the "progressive significance" of the political police troops of Ivan the Terrible, whose tradition continues to the present time.

Turning to the eighteenth century V. I. Zuev states that the popular sovereignty and general will of J. J. Rousseau were used by the "bourgeoisie" as slogans to screen their own dictatorship over the *proletariat*:

The U. S. Declaration of Independence proclaimed formally the principle of bourgeois "popular" sovereignty. However, in fact the sovereignty of the U.S.A. like that of any other bourgeois State had not, may not have and has not anything in common with popular sovereignty. The "popular sovereignty" formally proclaimed in the U.S.A. was and is a legal fiction. In fact it has represented since the beginning of its proclamation the reactionary dictatorship of the American bourgeoisie: within, the oppression of the toiling masses, without, the ill-famed Monroe Doctrine which has meant in reality "freedom" of interference on the part of the U.S.A. in the affairs of the Latin American nations and today interference in the affairs of all nations of the world as well as an aggressive policy aimed at provoking a new world war. (p. 29.)

The author condemns the English concept of the sovereignty of Parliament which also screens the "bourgeois" dictatorship, as well as the Hegelian idea of the absolute sovereignty of the state. As there is not much difference between Hegel's concept of sovereignty and that of Mr.

Vyshinskii (except for the materialistic outlook of the latter), it is interesting to quote the author's anathema cast upon the German philosopher to whom Karl Marx owed so much:

This completely reactionary theory was the expression of German Prussianism, justified the militarism and aggressiveness of the Prussian monarchy, and arbitrariness and lawlessness in international relations. (pp. 29-30.)

According to Mr. Vyshinskii a sovereign state is independent of any other authority in international relations; he does not temper his definition by any reference to international law. It is not surprising, therefore, that Mr. V. I. Zuev rejects as reactionary the modern theories of the sovereignty of law and in particular of international law: "The theory of 'the sovereignty of law' and that of 'the sovereignty of the legal order' are only a form of camouflaging the class power of the bourgeoisie." (p. 30.) This part of the article is concluded by a flamboyant condemnation:

The Western European bourgeois science of law could not establish a scientific concept of sovereignty because of its class narrow-mindedness and its reactionary political tendencies: dogmatism, formalism, metaphysics, abstraction from the social-political content of sovereignty, extreme legalism in framing its concept, eliminating from that concept the factual element, deduction from sovereignty of the "right" of aggression, expansion, intervention, limitation of the applicability of the principle of sovereignty to a narrow circle of the so-called "civilized states," refutation of the possibility of the co-existence of State Sovereignty and international law—such are the fundamental defects of the bourgeois "theory" of sovereignty. (p. 30.)

To avoid the pitfalls of "bourgeois" jurisprudence the Soviet lawyers have to seek their inspiration in Ivan the Terrible, Peter the Great, Sanin, and, if they cared to quote the Western sources, in King James and Hobbes.

The last part of the same article is devoted to the writings of the Russian thinkers of the eighteenth and nineteenth centuries. These writers were very strongly influenced by Western political thought, although even this obvious fact is denied now by the Soviet commentators. According to the latter, Rousseau was but a "petty bourgeois" when he advocated the principle of popular sovereignty; but the Russian writer, Radishchev, who adapted Rousseau and Mably's conceptions to the Russian conditions of his time, was, of course, original and progressive. Once one has denied bluntly any foreign influence upon Radishchev, one may denounce Rousseau and Mably and in the same breath declare that "Radishchev's conception of sovereignty [of the people] in respect to constitutional and international laws was progressive and democratic." (p. 31.) Was Radishchev truly original in: "1. denying the theory of the sovereignty of the monarch, 2. in proclaiming the people as sovereign, 3. in recognizing revolution as the means of overthrowing absolutism . . ."? (p. 32.)

The Soviet intellectuals could read with profit such sentences quoted from the nineteenth-century writer Chernyshevskii:

. . . To keep in subjection a foreign nation which does not consent to alien rule, to refuse independence to a nation only because this seems to be profitable to one's military might and political influence on other nations—is vile. (p. 33.)

Chernyshevskii warned: "Conquering nations always ended their careers in their own extermination and servitude." (p. 34.) Another nineteenth-century writer, Dobrolyubov, composed a sentence which could serve as a motto for the United Nations, though it would hardly correspond to present-day Russia's policies: "True patriotism being a particular expression of love for mankind, it may not co-exist with unfriendliness towards other nationalities." (p. 34.)

V. I. Zuev sums up the writings of the modern Russian progressive thinkers by stating that they advocated the full independence of all nations, the right of revolution against absolutism (we would use the modern term: totalitarianism), peaceful international co-operation among nations, non-intervention in the domestic affairs of other states, a harmonious co-existence of patriotism and internationalism. All this is not contrary to the best of the Western political heritage, but does not seem to correspond to Soviet internal and external policies. A Sanin would feel, perhaps, at home in the Soviet Union, but not a Radishchev, a Chernyshevskii or a Hertzen. Of course, Mr. V. I. Zuev concludes his article differently:

The Western bourgeois science of constitutional and international law established the theory of State sovereignty following the Russian theory of sovereignty, and afterwards tried to cover it up. The Russian science of constitutional and international law was the first to create this doctrine and has developed it since. The Russian revolutionary democrats created the revolutionary-democratic teaching concerning popular sovereignty which stood a whole head above the Western theory of popular sovereignty. (p. 37.)

The same urge for establishing priorities, as well as very practical considerations, pervades another interesting article in the same issue: "The question of the regime of the Antarctic" (pp. 38-43), by B. V. Kostritsin. The author begins by establishing Russian priority of discovery of the Antarctic Continent:

In the early 70's of the XVIIIth century the English navigator, James Cook, undertook the search for this mysterious land. But he never reached the Antarctic continent and made a false report that there was no land at the South Pole. The Russian navigators, F. F. Bellinshausen and M. P. Lazarev, succeeded in proving to the world that the southern continent existed and that Cook was mistaken, because on January 28th, 1820, they had discovered the existence of the sixth part of the world—the Antarctic. . . . Thus, Russia, and, by succession, the Soviet Union has priority of discovery of the southern continent, a priority established in the most historical manner. (p. 38.)

To establish this priority is important because:

The practical significance of the Antarctic is determined foremost by the fact that the shortest air routes between the three continents of the Southern Hemisphere—Africa, Australia and Latin America—lie across it. Military bases established on this continent and the surrounding islands may give a full control over those communications. Moreover, the Antarctic continent controls strategically the international maritime highway around Cape Horn. Finally, the Antarctic serves as the place of important meteorological observations. Thus, this continent and the adjacent waters have an international importance, and the question of the administrative regime of the Antarctic must be solved in accordance with the needs of all States concerned. The Soviet Union has the uncontestable right of initial discovery of the Antarctic and the resulting right to participation in the settlement of the question of its regime as well as the right to a real exploitation of the whaling industry. (p. 38.)

Mr. B. V. Kostitsin rejects the theory of South Polar sectors, while admitting it in respect to the Arctic region: "The appraisal of this doctrine must take into consideration the great difference between the Northern and the Southern Polar regions of our globe." (p. 39.) This difference consists in such features of the Arctic region: It is an ocean situated together with its islands in the fairly close neighborhood of the populated areas of nearby States. "For instance, those seas and lands (of the Arctic) represent a substantial source of products necessary for the existence of the population of the large coastal territory of the Soviet Union." (p. 39.) Both economically and strategically the northern states have a vital stake in the North Polar region. The author does not mention, however, the fact that air routes across the North Polar region are vital to the security of the whole Northern Hemisphere which represents the immense majority of mankind; yet, he uses this argument freely in respect to the Antarctic.

He cites the Soviet decree of April 15, 1926, which annexed to the Soviet Union the whole Arctic territory, actually discovered or not, if located within the Soviet sector of the Arctic. The Antarctic, where the sector theory would not serve the Soviet purposes, is an altogether different matter. There the problem must be settled by an international régime. The claims of various states to Antarctic areas are rejected as sheer imperialism. While refusing to recognize the claims of Britain, Australia, New Zealand, France, Chile and Argentina, he reserves a specially severe criticism for Norway which dared to annex in 1939 Peter I Island, apparently discovered by the above-mentioned Russian navigators in 1820; he recalls the Soviet official protest forwarded to Norway in the same year.

One might have the impression that the Russians and the Americans agree for once, because both states have never recognized the various claims to the Antarctic regions. But it is not easy to satisfy the Soviet Union:

Thus, the U.S.A. policy towards the sector partition of the Antarctic is clear: opposing the policy of the seizure of the Antarctic lands by

the other States, the U.S.A. is preparing, at the same time, the conditions for the seizure of the whole Antarctic, *i.e.*, is following the same political line only on a much bigger scale, considering as its "sector" the whole Antarctic continent. (p. 41.)

According to the author, an international regime as propounded by the U. S. would amount in reality to a wholesale annexation of the Antarctic. He sees one of the proofs of these "dark" designs in what he calls the American attempts at dislodging Great Britain from the Antarctic; he thinks that Chile and Argentina presented their claims conflicting with those of Britain because of the advice extended to those republics by the American Government:

During the Second World War and since, the struggle for the dominion of the Antarctic has been developing mainly between the two strongest imperialist Powers: the U.S.A. and England. In this struggle the U.S.A. uses for her own purposes the countries of Latin America, in particular Chile and Argentina which present claims to definite areas of the Antarctic.

It is completely obvious that Chile and Argentina would not have begun their dispute with England concerning the Antarctic, if there were not in existence an inter-American bloc under the aegis of the U.S.A., and if the American imperialists were not standing behind their backs. (p. 41.)

Although the United States has never acknowledged the sector system, the author states:

The sector system of partition of the Antarctic region leads to the militarization of the region, because the imperialists of various countries, above all the U. S. A. and England, attempt to maintain the positions which they have seized, encircle the southern continent with a network of military bases, establish control over the air and maritime routes which cross this area, infringing in this way upon the interests of other countries. This is why the sector partition of the Antarctic represents a menace to peace and security. (pp. 41-42.)

Then the author offers the Soviet solution:

We think that international administration of the Antarctic should mean not the denial of sovereignty, but a co-operation of sovereign States in the exploitation and peaceful use of the Antarctic region. The Danube Convention of August 18th, 1948, founded upon respect for the sovereignty of the Danubian countries provides an example of such collaboration of sovereign independent States. (p. 42.)

It is not quite clear what the author has in view: Is it an international administration of the whole area without the recognition of any specific rights of some countries in respect to certain parts of that area, or a partition of the Antarctic among several "sovereign" states which would co-operate in regard to matters of common interest? If he has in mind the second solution and, because of it, stresses the importance of respecting fully the

sovereignty of the participating states, then he includes probably his own state among those which have valid claims to the particular Antarctic areas by virtue of discovery. It is rather a mistake for a Soviet author to cite the Danubian Convention. Was it not the Soviet Delegation to the Belgrade Danubian Conference which refused to the non-riparian delegations of the United States, Britain and France, any influence in the drafting of the convention, and does not the convention exclude completely the non-riparians from any participation in the fluvial administration of the Danube? A strict analogy would forbid the Soviet Union from complaining in regard to the Antarctic, as she has no possessions in the Southern Hemisphere. But the Soviet author does complain:

In August, 1948, the U. S. Department of State made public the opening of informal conversations with Argentina, Chile, Australia, New Zealand, England, France and Norway, concerning "the form of the internationalization of the Antarctic" and the establishment of an "international administration." Carrying on those behind-the-scenes conversations concerning the Antarctic without the participation of the U.S.S.R., the American imperialists try to ignore the legal right of the Soviet Union which results from the great Russian discoveries of the Antarctic. It is obviously clear that the American theory of "internationalization" is but a fig-leaf to cover the American imperialists' design to seize the whole of the Antarctic. (p. 42.)

The author concludes by quoting from the Soviet memorandum of June 7, 1950, addressed to the United States and all states which were invited by the United States to hold joint conversations: "The Soviet Government cannot recognize as legal any settlement of the Antarctic regime which would be adopted without its participation." (p. 43.) Probably in order to strengthen its claims by something more tangible than the explorations of 1820, the Soviet Union since the last war has been organizing whaling expeditions to the Antarctic areas.

In the April issue (No. 4, 1951) of the *Sovetskoe Gosudarstvo i Pravo* the most interesting article for an international lawyer is that of Professor A. N. Trainin, a member-correspondent of the U.S.S.R. Academy of Sciences, entitled: "The statute concerning the defense of peace" (pp. 16-25). He comments on the statute so entitled passed on March 12, 1951, by the Supreme Soviet of the U.S.S.R. The statute declares any act of war propaganda, in any form whatsoever, to be "a most serious crime against mankind." The idea of adding to criminal legislation a prohibition of incitement to an aggressive war is not new and has preoccupied international penal lawyers since the foundation of the League of Nations. The obligation of Members of the United Nations not to resort to war, except in the case of individual or collective self-defense or a joint action of the United Nations, makes the problem even more urgent. But the drafting of a clear definition of what is incitement to an aggressive war is by no means easy, because one could encroach unduly upon freedom of discussion,

especially of international problems, by a too comprehensive definition. This difficulty does not exist for a totalitarian country where freedom of discussion does not exist anyhow, and where judges know the Party line and may easily distinguish between licit and illicit opinions. No wonder, therefore, that the Soviet definition of war propaganda is extremely broad. According to Professor Trainin, war propaganda represents a much wider concept than that of instigation, because it covers not only a direct incitement to commit the definite crime of an aggressive war against a particular state, but also "any newspaper article, any meeting speech, any radio talk which may create a general trend in favor of an aggressive war without containing, however, a direct incitement to such aggression." (p. 22.) Professor Trainin illustrates his statement by the example of an American weekly article which discussed the advantages for the West of the withdrawal of the U.S.S.R. from the United Nations; this was in his understanding a clear case of war propaganda: "Moreover, the propaganda, in contradistinction to instigation, might not involve incitement to an aggressive war against a definite State." (p. 22.)

The propaganda might be expressed by a written or spoken word. The American warmongers use widely for such propaganda the press, the radio, the theater and the movies. The propaganda might be public (for instance, at a public meeting or in a newspaper) or might not have this public character (for instance, a speech at a secret meeting of a political party) The instigation, as a general rule, results in criminal responsibility, if the incitement to crime has had real consequences and the crime itself has been committed. War propaganda results in criminal responsibility independently of its criminal consequences. (p. 23.)

Judging by the long Soviet list of Western "warmongers," a Soviet judge could convict thousands of persons for the crime of war propaganda, because every criticism of the Soviet Union and her foreign policy is deemed, according to Soviet current standards, to be criminal war propaganda.

W. W. KULSKI

INTEGRATION OF INTERNATIONAL LEGISLATION

Efforts are being made in the United Nations toward a greater integration in one field of international legislation which are different from those undertaken on earlier occasions (such as in the case of the Buenos Aires Treaty of 1936 to Co-ordinate Existing Treaties, or even of the Pact of Bogotá of 1948 and the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others), and which do not seem to have attracted much attention. They are therefore briefly described hereafter.

The field in question is that of international drug control which is governed by a number of international treaties: (1) The pre-World War I International Opium Convention (The Hague, January 23, 1912), followed by various agreements concluded under the auspices of the League of Nations; namely, (2) the Agreement concerning the Manufacture of, Internal Trade in, and Use of Prepared Opium, with Protocol (Geneva, February 11, 1925); (3) the Convention relating to Dangerous Drugs, with Protocol (Geneva, February 19, 1925); (4) the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, with Protocol of Signature (Geneva, July 13, 1931); (5) the Agreement for the Control of Opium-Smoking in the Far East (Bangkok, November 27, 1931); (6) the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, with Protocol of Signature (Geneva, June 26, 1936); (7) under the United Nations, the Protocol Bringing under International Control Drugs Outside the Scope of the 1931 Convention (Paris, November 19, 1948).

The coexistence of all these international instruments resulted in a complex situation as far as their aims and scope, the parties thereto, and the organs created thereby, are concerned.

As for their *aims* and *scope*, the 1912 Convention was to "bring about the gradual suppression of the abuse of opium, morphine and cocaine, as also of the drugs prepared or derived from these substances, which give rise or might give rise to similar abuses." The 1925 Agreement aimed at the "gradual and effective suppression of the manufacture of, internal trade in and use of prepared opium" in the Far Eastern possessions and territories of the contracting parties, as well as the suppression of the use of opium for smoking. The 1925 Convention sought to achieve a "more effective limitation of the production or manufacture of the substances" covered by the 1912 Convention and a "closer control and supervision of the international trade, than are provided for" in the latter. The 1931 Convention was concluded in order to supplement the 1912 and 1925 instruments by "rendering effective . . . the limitation of the manufacture of narcotic drugs to the world's legitimate requirements for medical and scientific purposes and by regulating their distribution." The Bangkok Agreement (1931) prescribed further measures for the suppression of opium smoking in the Far East. The 1936 Convention aimed at strengthening the means for penalizing offenses against the 1912, 1925 and 1931 conventions and at combatting most effectively the illicit traffic in the drugs and substances covered by the same. The 1948 Protocol, finally, sought to place under international control newly discovered, in particular, synthetic drugs, thus far outside the scope of the 1931 Convention.

As for the *parties* to the above-mentioned instruments, the 1912 Convention was ratified or adhered to, as of November 15, 1949, by 67 states; the 1925 Agreement, by 8 states all of which were also parties to the 1912 Con-

vention; the 1925 Convention, by 56 states all but two of which were also parties to the 1912 Convention; the 1931 Convention, by 67 states all but three of which were also parties to the 1912 Convention, while thirteen of them were not parties to the 1925 Convention; the Bangkok Agreement by seven states all of which also ratified the 1925 Agreement; the 1936 Convention by thirteen states all of which were also parties to the 1912 and 1931 conventions but with two exceptions only to that of 1925; and the 1948 Protocol, by 25 states all but three, nine or five of which were also parties to the 1912, 1925 or 1931 Conventions, respectively.

With regard to the *organs* charged with the application of the conventions: (1) The Advisory Committee on Traffic in Opium and Other Dangerous Drugs of the League of Nations was, apart from the International Opium Commission of 1909, the first international organ exclusively concerned with the problem of narcotic drugs. Created in 1920, it consisted first of eight and finally (in 1939) of 24 governmental representatives. It was a policy-making body having to "secure the fullest possible co-operation between the various countries," as well as to assist and advise the League Council in matters concerning narcotic drugs.¹ (2) The corresponding organ under the United Nations is the Commission on Narcotic Drugs, established in 1946 as a subsidiary organ of the Economic and Social Council and consisting of fifteen governmental representatives. (3) The 1925 Convention provided for a Permanent Central Opium Board of eight experts who were originally appointed by the League Council and are now appointed by the Economic and Social Council. The Board exercises supervisory and control, as well as enforcement, functions and is assisted by a secretariat. (4) The 1931 Convention added a Supervisory Body composed of four members of whom one each was to be appointed by the Permanent Central Board, the Advisory Committee (now replaced by the Commission on Narcotic Drugs), the Health Committee of the League² and the *Office International d'Hygiène Publique* (both replaced now by the World Health Organization³). The Supervisory Body is mainly concerned with the yearly estimates of the medical and scientific needs of narcotic drugs of the world and it, too, is assisted by a secretariat.

In view of this diversity of aims, scope, parties and organs, it is not surprising that a greater integration and simplification was considered desirable. The first step taken in this connection was similar to those in other fields (traffic in women and children, circulation of, and traffic in, obscene publications, pacific settlement of international disputes, economic statistics), namely, to transfer to the United Nations the functions conferred upon, and exercised by, the League of Nations. This was done by the

¹ See U. N. Doc. E/CN.7/AC.3/1, p. 41.

² Which had a permanent Opium Subcommittee.

³ Which established an Expert Committee on Habit-Forming Drugs.

Protocol amending the above-mentioned agreements, conventions and protocols on narcotic drugs. It was signed at Lake Success on December 11, 1946, and it substituted the Secretary General or the Secretariat of the United Nations for the same organs of the League, the Economic and Social Council for the League Council, the Commission on Narcotic Drugs for the Advisory Committee of the League, the Members of the United Nations or the High Contracting Parties for the Members of the League, the World Health Organization for the League's Health Committee and the *Office International d'Hygiène Publique*; and the International Court of Justice for the Permanent Court of International Justice.

The main decision of integration was taken by the Economic and Social Council. On the recommendation of its Commission on Narcotic Drugs, it adopted, on August 3, 1948, the following resolution:

The Economic and Social Council,

Taking note of the complexity of these [the above-mentioned] instruments and the desirability of simplifying the organization of international co-operation for controlling the traffic in narcotic drugs,

Requests the Secretary-General to begin work on the drafting of a new single convention in which provision shall be made for a single body to perform all control functions, excepting those which are now or may hereafter be entrusted to the Commission on Narcotic Drugs. The single convention shall replace the above-mentioned instruments relating to narcotic drugs and also include provisions for the limitation of the production of narcotic raw materials.⁴

According to this resolution, a "new single convention" shall be drawn up which shall (1) replace the above-mentioned international instruments, (2) provide for a single body to perform all control functions, except those entrusted to the Commission on Narcotic Drugs, and (3) limit the production of narcotic raw materials.

Pursuant to the resolution, the Secretariat of the United Nations prepared the necessary documentation⁵ and submitted in March, 1950, to the Commission on Narcotic Drugs a draft single convention⁶ with a detailed commentary.⁷ The Commission discussed the draft at its fifth and sixth sessions in 1950 and 1951 and proposes to study it in detail during its seventh session in 1952, taking also into consideration observations received thereon by governments, the Central Board and the Supervisory Body.⁸

The Secretariat's draft, as far as the *scope* of the new single convention is concerned, distinguishes between drugs to which all measures of international and/or domestic control apply, plants which shall be subject to

⁴ Resolution 159 (VII) IID, U. N. Doc. E/CN.7/AC.3/1, p. 4.

⁵ *Id.* and U. N. Doc. E/CN.7/AC.3/2.

⁶ U. N. Doc. E/CN.7/AC.3/3.

⁷ U. N. Doc. E/CN.7/AC.3/4.

⁸ U. N. Docs. E/1889; E/CN.7/216, par. 68.

special controls, and drugs in which there shall be no trade, production or manufacture except for scientific experiments. The parties would agree, under the draft, to limit (with certain exceptions) exclusively to medical and scientific purposes (a) the production of opium, coca leaves, Indian hemp and the resin of the Indian hemp plant, (b) the manufacture of drugs, (c) the import and export of drugs, and (d) the internal trade in, and the distribution and use of, drugs. The parties would also adopt penal measures for cases of violation of the convention.

As to international control *organs*, the draft provides for (a) the International Drug Commission, (b) the International Drug Board, and (c) the Secretariat. The International Drug Commission is identical with the present Commission on Narcotic Drugs of the United Nations and is to continue the latter's policy-making functions. The International Drug Board is to replace both the Permanent Central Board and the Supervisory Body. It shall consist of nine members to be elected by the Economic and Social Council and is to exercise semi-judicial and administrative functions, including those of an international clearing house. The number of secretariats is reduced from the existing three (of the Commission, the Central Board and the Supervisory Body) to one which shall serve both the Commission and the Board and be provided by the Secretary General of the United Nations.

Finally, the draft deals with the coming into force of the single convention, amendments, denunciations, reservations and the relationship of the new text to the existing instruments. It shall terminate and replace the latter as between the parties to it. Two régimes shall thus prevail for a certain time: one resulting from the new convention for the parties thereto, and one following from the earlier instruments and applying not only to the parties thereto which have not accepted the single text, but also between the latter and the first. To prevent any interruption in the international control of narcotics after the entry into force of the new text, the draft provides that the old Central Board shall provisionally carry out the functions of the new Drug Board while, as from a date to be fixed by the Economic and Social Council, the new Board shall undertake both those of the old Board and the Supervisory Body even with respect to states not parties to the new convention. To justify this unusual procedure, the Secretariat's commentary to the draft points out that

to maintain the supervisory bodies as established by these Conventions (of 1925 and 1931) for the intermediary period and for so long as the new Convention has not been ratified by all the original Parties to the 1925 and 1931 Conventions, would lead to inextricable complications, for it would mean that in addition to the organs established by these Conventions there would be the new organs set up by the new Convention.⁹

⁹ U. N. Doc. E/CN.7/AC.3/4, p. 92.

As a precedent the commentary refers to the Amendment Protocol of 1946 whereby the composition of the Supervisory Body as set up in 1931 was changed and this Body

in its modified form has nevertheless exercised its functions since then with respect to States which have not acceded to the Protocol . . . and which are Parties to non-amended Conventions. This is justified not only on practical grounds but also in view of the universality of the Conventions on narcotic drugs.¹⁰

Besides this juridico-technical problem, there are two of a juridico-political nature. One is the question whether the simplification and integration of the existing international legislation concerning drug control should be coupled with its development and improvement and the stopping of "any gaps now existing in the international control," as the Commission on Narcotic Drugs put it.¹¹ Ordinary codification is often marred by the difficulty of agreeing where the *lex lata* ends and the *lex ferenda* begins; here the latter is deliberately included.

The other juridico-political problem is that of timeliness. As one of the Secretariat's memoranda points out, "the whole prospect as regards the control of narcotic drugs, the illicit traffic and addiction has been fundamentally changed in recent years by the discovery of synthetic drugs, the preparation of which may become simple and inexpensive."¹² Furthermore, "by far, the largest part of the coca leaf production goes in chewing and the control of chewing is not yet," while a very great percentage of the opium production is "used for the manufacture of morphine, which is in turn mostly converted into codeine. But the commercial production of synthetic morphine convertible into synthetic codeine is round the corner."¹³ In this connection, the same memorandum refers to the 1948 Protocol which was believed to be "up to date in meeting the immediate difficulty of synthetic drugs." However, the latter's "dangerous potentialities (are) so uncertain that already the technical experts of WHO (World Health Organization) have made proposals which go beyond the Protocol and involve a radical change in the existing system."¹⁴

Experts differ on the other hand, as to whether the appearance of synthetic drugs will reduce the amount of natural alkaloids needed for medical purposes. The contemplated comprehensive action might, moreover, be facilitated by the proposed Interim Agreement to limit the production of opium to medical and scientific needs and the proposed International Monopoly of Opium Alkaloids, both currently under discussion in the Commission on Narcotic Drugs. If, in addition, the procedure of amending the new convention is supple enough—as are indeed the draft's provisions

¹⁰ *Ibid.*

¹¹ U. N. Doc. E/CN.7/AC.3/1, p. 4.

¹³ *Ibid.*

¹² U. N. Doc. E/CN.7/AC.3/2, p. 52.

¹⁴ *Ibid.*

for both technical changes and more fundamental revisions and the Secretariat's alternative proposal for the adoption of an amendment by a two-thirds majority of the International Drug Commission and its coming into force with respect to all contracting parties, unless 25 states object to it¹⁵—the above-mentioned difficulties may be overcome.

SALO ENGEL

PROGRESS OF THE GENEVA CONVENTIONS OF 1949

The remarkable achievement of the Conference on Protection of Victims of War, which sat at Geneva from April 21 to August 12, 1949, stands out as a landmark in the history of international legislation. It was possible only because of a long and patient course of preparation, chiefly due to the efforts of the International Committee of the Red Cross.

The four conventions opened to signature on August 12, 1949, were signed on that date or within the following six months by as many as sixty-one states. Reservations to one or more of the conventions were made by twenty-five states at the time of signature.

The texts of the conventions, particularly that of the Convention on the Protection of Civilian Persons in Time of War, are somewhat voluminous, and three of the four conventions culminate a long legislative history.¹ It is understandable, therefore, that most of the signatories have not shown haste in proceeding to effect their ratifications, and this fact does not necessarily reflect an unfavorable attitude on the part of the states which have not yet ratified.

The record to date of deposits of the ratifications or accessions is quite gratifying. On July 15, 1951, deposits of fourteen ratifications of, or accessions to, the four conventions had been effected (in order of date) by Switzerland, Yugoslavia, Monaco, Liechtenstein, Chile, India, Czechoslovakia, the Holy See, Lebanon, Jordan, Pakistan, Denmark, France, and Israel; in addition, a ratification of the Convention on the Treatment of the Wounded and Sick in Armed Forces in the Field had been deposited by the Philippines. Reservations made by Yugoslavia, Czechoslovakia, and Israel at the time of signature were confirmed in their ratifications; Pakistan, which made no reservations at the time of signature, ratified the Convention on Protection of Civilians in Time of War with reservations to Articles 44 and 68(2).

Each of the four conventions contains a provision that "it shall come into force six months after not less than two instruments of ratification have been

¹⁵ U. N. Doc. E/CN.7/AC.3/4, pp. 94, 95.

¹ Texts published by the International Committee of the Red Cross, Geneva, 1949; also in State Department Publication No. 3938 (General Foreign Policy Series, 34, August, 1950). For a description of the conventions, see article by Jean S. Pictet in this JOURNAL, Vol. 45 (1951), p. 462.

deposited." The ratifications of Switzerland were deposited on March 31, 1950; and those of Yugoslavia on April 21, 1950; hence, according to the texts, the four conventions entered into force between these two states on October 21, 1950. For other ratifying or acceding states, each convention enters into force six months after the deposit of its ratification or accession.

The four conventions were signed on behalf of the United States, with a reservation to Article 68(2) of the Convention on the Protection of Civilian Persons in Time of War to the following effect:

The United States reserves the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offenses referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins.

The same reservation was made by Canada, New Zealand, The Netherlands and the United Kingdom.

On April 26, 1951, the President of the United States transmitted copies of the four conventions to the Senate, with a view to receiving the advice and consent of the Senate to ratification.² The message of the President, with the accompanying report by the Secretary of State, was referred to the Committee on Foreign Relations.

MANLEY O. HUDSON

FIRST HISPANO-LUSO-AMERICAN CONGRESS OF INTERNATIONAL LAW *

This writer wants to bring to the notice of his colleagues in the world that the first Hispano-Luso-American Congress of International Law will be held during October of this year in Madrid. The initiative has been taken by a group of Spanish professors and institutions of international law. The preparatory commission is presided over by the well-known international lawyer of the University of Madrid, Yanguas Messia; Dr. Luis García Arias is its Secretary.

The Congress will constitute one more step in the direction of strengthening the already existing ties between the Hispanic countries of America and the mother country. It is hoped to make these congresses a permanent institution, attended by the specialists of all the countries of the Hispanic world; later congresses will be held by rotation in the capitals of Hispanic America. In connection with these congresses, projects exist for the publication of a Dictionary of International Law, written by Hispanic scholars, for the drafting of multipartite conventions, and for the creation of a School for International Officials.

² 82nd Cong., 1 Sess., Senate Doc., Exec. D, E, F, G.

* This information is taken from the *Revista de la Facultad de Derecho y Ciencias Sociales* (Buenos Aires), Vol. VI, No. 23, Jan.-April, 1951, pp. 194-197.

The agenda of the first Congress has two subjects of public international law (foundation of international law, right of asylum), and two of private international law (double nationality, execution of foreign judgments) for deliberation. Papers will also be presented on many urgent problems, such as the treatment of war criminals, human rights, control of atomic energy, continental shelf, regime of polar regions, international regionalism, privileges and immunities of international officials, and so on.

While special Ibero-American problems and the ideas of the Spanish Fathers of International Law will be studied, this and the later congresses will be free from any isolationist exclusivism, but devoted to that universalism with which international law must be conceived if it is to realize the supreme ideal of international peace and justice.

JOSEF L. KUNZ

NEW MEMBERS OF THE PERMANENT COURT OF ARBITRATION

The President of the United States on May 7, 1951, appointed Charles Cheney Hyde, Edwin DeWitt Dickinson and Francis Biddle to be members of the Permanent Court of Arbitration. Together with Robert P. Patterson, who has been a member of the Court since October 29, 1948, the newly appointed members will this year nominate candidates to fill six vacancies occurring on the International Court of Justice.

The members of the Permanent Court of Arbitration are appointed for six-year terms by the governments parties to the Hague Conventions of 1899 and 1907. Each state is entitled to appoint four persons "of known competency in questions of international law," so that the 45 parties to the conventions may establish a panel of 180 members. There are at present about 150 members. They may be called on to form tribunals for arbitration of cases.

The members of the Permanent Court of Arbitration also serve under Article 4 of the Statute of the International Court of Justice as "national groups" for nominating candidates to be members of the International Court of Justice, who are elected by the concurrent action of the General Assembly and Security Council of the United Nations. The American national group will perform this function this year when six judges of the International Court of Justice are to be elected during the sixth session of the General Assembly for nine-year terms beginning February 6, 1952. Five of the vacancies are due to the expiration of the terms of office of Judges De Visscher, Fabela, Hackworth, Klaestad and Krylov; the sixth vacancy results from the recent death of Judge Philadelpho de Barros Azevedo, of Brazil. His term would have expired February 5, 1955.

In making nominations on the invitation of the Secretary General of the United Nations, the national groups act independently of their governments but are recommended by the Statute to consult their highest courts of jus-

tice, their legal faculties and schools of law, and their national academies and national sections of international academies devoted to the study of law.

The members of the Court appointed for six-year terms by the United States since the Conventions for the Pacific Settlement of International Disputes concluded at The Hague July 29, 1899, and October 18, 1907, became effective for the United States on September 4, 1900, and January 26, 1910, respectively, have been as follows: Benjamin Harrison, October 11, 1900, died March 31, 1901; Melville W. Fuller, October 11, 1900, November 27, 1906, died July 4, 1910; John W. Griggs, October 11, 1900, November 27, 1906, not reappointed; George Gray, October 11, 1900, November 27, 1906, November 27, 1912, January 12, 1920, died August 7, 1925; Oscar S. Straus, January 9, 1902, January 29, 1908, January 10, 1914, January 12, 1920, died May 3, 1926; Elihu Root, December 13, 1910, January 12, 1920, January 12, 1926, January 12, 1932, died February 6, 1937; John Bassett Moore, November 27, 1912, January 12, 1920, January 12, 1926, January 12, 1932, not reappointed; Charles E. Hughes, October 1, 1926, resigned effective March 31, 1930 (commissioned Chief Justice, United States Supreme Court February 13, 1930); Newton D. Baker, June 4, 1928, January 9, 1935, died December 25, 1937; Roland W. Boyden, April 16, 1930, died October 25, 1931; Robert E. Olds, December 18, 1931, died November 14, 1932; Manley O. Hudson, May 5, 1933, May 3, 1939, not reappointed; Michael Francis Doyle, February 7, 1938, February 15, 1944; Green H. Hackworth, March 9, 1937, March 9, 1943; Henry L. Stimson, February 7, 1938, February 7, 1944, resigned July 16, 1948; Cordell Hull, October 24, 1945, resigned August 16, 1948; Robert P. Patterson, October 29, 1948.

THE SOCIETY AND THE U. S. S. R.

Executive Council of

the American Society of International Law

Professor of Public Law, Mr. Hazard, having translated and printed in *The American Journal of International Law* my work entitled "Questions of Guerrilla Warfare in the Law of War" (a translation from the Soviet magazine, "News of the Section of Economics and Law of the Academy of Sciences of the U.S.S.R.," No. 4 for the year 1945), informed me at the end of 1946 that on his own initiative he had proposed my candidacy as a member of the American Society of International Law, and that this proposal had been accepted by the Society. Mr. Hazard then added, "I assumed that you would not object to this, although due to the error which I committed in my earlier letter, you did not state your opinion directly on this subject."

I did not state my opinion because neither the activity nor the political tendency of your Society was clear to me.

I, a Soviet jurist, support the Soviet conception of International Law—a conception directed toward the preservation of peace and security of peoples, on the creation of friendly relations between peoples, based on the principle of equality and sovereignty of their states.

I am proud of the fact that with this conception of International Law my country has won the sympathy of all of advanced mankind and has come to be recognized as being in the vanguard in the active battle against imperialist aggression. This is clearly

proved by the declarations of the supporters of peace throughout the world, and in particular in the U.S.A. and at the Paris World Congress of Supporters of Peace.

Your Society, which, as follows from its name, should make itself an active supporter of peace, in fact stands apart from the declarations to which I have referred, and as I have learned in your magazine, "The American Journal of International Law," there have been hostile attacks on the peaceful policy of my country, and violations of International Law by the Anglo-American kindlers of war, and their reactionary policy of interference in the internal affairs of other states have been supported.

All of this indicates that our paths have separated, and I have therefore not replied to the circular letters of your Society.

I am body and soul with those Americans who, in fighting against aggressive imperialism, defend peace throughout the world.

If your Society continues to list me formally as a member, even though I have given no reason by my actions for them to do so, let my statement be known that I do not consider myself a member of your Society.

(Signed) Academician I. TRAININ

May, 1949

American Society of International Law,
Washington, D. C.,
U. S. A.

24th July 1951

Sirs,

The American Journal of International Law has for several years past been publishing articles containing false and libellous statements concerning the foreign policy and international practices of the USSR.

The journal, issued by the American Society of International Law, of which I am a member, has been turned into a vehicle of slanderous misrepresentation of my country, into an instrument for kindling hostility between states and nations.

As a Soviet citizen and as a student of international law, whose mission it should be to promote peace and cooperation among nations, I deem it impossible to remain a member of the American Society of International Law, and I hereby request you no longer to consider me such.

(Signed) E. KOROVIN

Corresponding Member,
Academy of Sciences of the USSR

JUDICIAL DECISIONS

BY WILLIAM W. BISHOP, JR.

Of the Board of Editors

HAYA DE LA TORRE CASE (Colombia/Peru). I.C.J. Reports, 1951, p. 71.
International Court of Justice, Judgment of June 13, 1951.

Diplomatic asylum.

Intervention under Article 63 of the Statute and Article 66 of Rules.—Admissibility of intervention.—Its limits.

Jurisdiction based on attitude of Parties.—Manner of carrying out Judgment of November 20th, 1950.—Choice between various means.—Judicial function of Court.

Res judicata.—Provisional character of diplomatic asylum.—Methods of terminating asylum under Havana Convention on Asylum of 1928.—No surrender of political offenders to territorial authorities.

Character and legal consequences of Judgment of November 20th, 1950.—Termination of asylum.¹

On December 13, 1950, Colombia filed an application referring to the Judgments of November 20, 1950,² and November 27, 1950,³ in the proceedings regarding the asylum of the Peruvian Haya de la Torre in the Colombian Embassy in Peru, and asking the Court to determine the manner in which effect should be given to the former Judgment and, in particular, whether Colombia was obligated to surrender M. Haya de la Torre to the Peruvian Government. Both Colombia and Peru named judges *ad hoc* to sit on the Court for the case.⁴ By a letter of January 22, 1951, the Colombian Agent informed the Registrar of the Court that his government relied on the Havana Convention on Asylum of 1928;⁵ and upon notice being given to the parties to that convention, Cuba expressed its views regarding the construction of the convention. Colombia indicated no objection to Cuban intervention, but Peru asked the Court to find the intervention not admissible. After argument, the Court admitted Cuban intervention.

In its submissions, Colombia asked the Court:

To state in what manner the Judgment of November 20th, 1950, shall be executed by Colombia and Peru, and furthermore, to adjudge and declare that Colombia is not bound, in execution of the said judgment

¹ Caption by the Court.

² I.C.J. Reports, 1950, p. 266; this JOURNAL, Vol. 45 (1951), p. 179.

³ I.C.J. Reports, 1950, p. 395; this JOURNAL, Vol. 45 (1951), p. 195.

⁴ José Joaquín Caicedo Castilla for Colombia, and Luis Alayza y Paz Soldán for Peru.

⁵ See this JOURNAL, Supp., Vol. 22 (1928), p. 158.

of November 20th, 1950, to deliver M. Víctor Raúl Haya de la Torre to the Peruvian authorities.

In the event of the Court not delivering judgment on the foregoing Submission, may it please the Court to adjudge and declare, in the exercise of its ordinary competence, that Colombia is not bound to deliver the politically accused M. Víctor Raúl Haya de la Torre to the Peruvian authorities.

In its submissions, Peru asked the Court:

I. To state in what manner the Judgment of November 20th, 1950, shall be executed by Colombia;

II. To dismiss the submissions of Colombia by which the Court is asked to state solely [*"sans plus"*] that Colombia is not bound to deliver Víctor Raúl Haya de la Torre to the Peruvian authorities;

III. In the event of the Court not delivering judgment on submission No. I, to adjudge and declare that the asylum granted to Señor Víctor Raúl Haya de la Torre on January 3rd, 1949, and maintained since that date, having been judged to be contrary to Article 2, paragraph 2, of the Havana Convention of 1928, ought to have ceased immediately after delivery of the Judgment of November 20th, 1950, and must in any case cease forthwith in order that Peruvian justice may resume its normal course which has been suspended.

After setting forth the foregoing procedural details, the Court gave as its opinion:

The Government of Cuba, availing itself of the right which Article 63 of the Statute of the Court confers on States parties to a convention, filed a Declaration of Intervention with the Registry on March 13th, 1951, and attached thereto a Memorandum in which it stated its views in regard to the interpretation of the Havana Convention of 1928 ratified by it and also its general attitude towards asylum. The Court considered that this Memorandum was regarded by the Government of Cuba as constituting the written observations provided for in paragraph 4 of Article 66 of the Rules of Court.

The Government of Peru contended that the intervention of the Government of Cuba was inadmissible, owing to the Declaration of Intervention being out of time, and to the fact that the Declaration and the Memorandum accompanying it did not constitute an intervention in the true meaning of the term, but an attempt by a third State to appeal against the Judgment delivered by the Court on November 20th, 1950.

In regard to that question, the Court observes that every intervention is incidental to the proceedings in a case; it follows that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings. The subject-matter of the present case differs from that of the case which was terminated by the Judgment of November 20th, 1950: it concerns a question—the surrender of Haya de la Torre to the Peruvian authorities—which in the previous case

was completely outside the Submissions of the Parties, and which was in consequence in no way decided by the above-mentioned Judgment.

In these circumstances, the only point which it is necessary to ascertain is whether the object of the intervention of the Government of Cuba is in fact the interpretation of the Havana Convention in regard to the question whether Colombia is under an obligation to surrender the refugee to the Peruvian authorities.

On that point, the Court observes that the Memorandum attached to the Declaration of Intervention of the Government of Cuba is devoted almost entirely to a discussion of the questions which the Judgment of November 20th, 1950, had already decided with the authority of *res judicata*, and that, to that extent, it does not satisfy the conditions of a genuine intervention. However, at the public hearing on May 15th, 1951, the Agent of the Government of Cuba stated that the intervention was based on the fact that the Court was required to interpret a new aspect of the Havana Convention, an aspect which the Court had not been called on to consider in its Judgment of November 20th, 1950.

Reduced in this way, and operating within these limits, the intervention of the Government of Cuba conformed to the conditions of Article 63 of the Statute, and the Court, having deliberated on the matter, decided on May 16th to admit the intervention in pursuance of paragraph 2 of Article 66 of the Rules of Court.

In its Judgment of November 20th, 1950, the Court defined the legal relations between Colombia and Peru with regard to matters referred to it by them relating to diplomatic asylum in general and particularly to the asylum granted to Víctor Raúl Haya de la Torre by the Ambassador of Colombia in Lima on January 3rd-4th, 1949. On the day of the delivery of this Judgment the Government of Colombia submitted to the Court a Request for Interpretation, which by the Judgment of November 27th, 1950, was declared to be inadmissible.

On the following day, the Minister for Foreign Affairs and Public Worship of Peru, relying on the Judgment of November 20th, addressed a note to the Chargé d'Affaires of Colombia at Lima, stating in particular:

"The moment has come to carry out the Judgment delivered by the International Court of Justice by terminating the protection which that Embassy is improperly granting to Víctor Raúl Haya de la Torre. It is no longer possible further to prolong an asylum which is being maintained in open contradiction to the Judgment which has been delivered. The Colombian Embassy cannot continue to protect the refugee, thus barring the action of the national courts.

You must take the necessary steps, Sir, with a view to terminating this protection, which is being improperly granted, by delivering the refugee Víctor Raúl Haya de la Torre, so that he may be placed at the disposal of the examining magistrate who summoned him to appear for judgment, in accordance with what I have recited above."

In a Note dated December 6th, 1950, addressed to the Minister for Foreign Affairs and Public Worship of Peru, the Minister for Foreign Affairs of Colombia refused to comply with this request; he relied in particular on the following considerations:

"Consequently, the Court formally rejected the complaint made against the Government of Colombia in the counter-claim of the Government of Peru, namely, that it had granted asylum to persons accused of or condemned for common crimes. Should Colombia proceed to the delivery of the refugee, as requested by Your Excellency, [it] would not only disregard the Judgment to which we are now referring, but would also violate Article I, paragraph 2, of the Havana Convention which provides that: 'Persons accused of or condemned for common crimes taking refuge in a legation shall be surrendered upon request of the local government.'"

These are the circumstances giving rise to the present case which has been brought before the Court by the Government of Colombia by Application of December 13th, 1950.

The Parties have in the present case consented to the jurisdiction of the Court. All the questions submitted to it have been argued by them on the merits, and no objection has been made to a decision on the merits. This conduct of the Parties is sufficient to confer jurisdiction on the Court.

.⁶

These Submissions are both designed to obtain a decision from the Court as to the manner in which the asylum should be terminated. The portion of the Judgment of November 20th, 1950, to which they refer is the passage where, in pronouncing on the question of the regularity of the asylum, it declares that the grant of asylum was not made in conformity with Article 2, paragraph 2 ("First"), of the Havana Convention on Asylum of 1928. The Court observes that the Judgment confined itself, in this connection, to defining the legal relations which the Havana Convention had established between the Parties. It did not give any directions to the Parties, and entails for them only the obligation of compliance therewith. The interrogative form in which they have formulated their Submissions shows that they desire that the Court should make a choice amongst the various courses by which the asylum may be terminated. But these courses are conditioned by facts and by possibilities which, to a very large extent, the Parties are alone in a position to appreciate. A choice amongst them could not be based on legal considerations, but only on considerations of practicability or of political expediency; it is not part of the Court's judicial function to make such a choice.

In the second part of its principal Submission, the Government of Colombia requests the Court

⁶ Here the Court referred to the first part of the Colombian principal submission, and Peruvian submission I.

“to adjudge and declare that Colombia is not bound, in execution of the said Judgment of November 20th, 1950, to deliver M. Víctor Raúl Haya de la Torre to the Peruvian authorities.”

This part of the principal Submission of Colombia is strictly limited by the words “in execution of the said Judgment of November 20th, 1950.” These words serve to confine the request thus formulated, as in the first part of the same Submission, to the execution of the Judgment of November 20th, 1950.

As was stated both in that Judgment and in the Judgment of November 27th, 1950, the Government of Peru had not demanded the surrender of the refugee. This question was not submitted to the Court and consequently was not decided by it. It is not therefore possible to deduce from the Judgment of November 20th any conclusion as to the existence or non-existence of an obligation to surrender the refugee. In these circumstances, the Court is not in a position to state, merely on the basis of the Judgment of November 20th, whether Colombia is or is not bound to surrender the refugee to the Peruvian authorities.

For these reasons, the Court cannot give effect to the above-mentioned Submissions.

.⁷

The Government of Peru states in this Submission that the Court is asked by the Submissions of Colombia “to state solely that Colombia is not bound. . . .” By using this word “solely” (“*sans plus*”) the Government of Peru wishes to convey that the legal position which the Judgment of November 20th created for it must in any case be preserved; it refers thus to the statement set forth in its third Submission, which will be examined later.

As mentioned above, the question of the surrender of the refugee was not decided by the Judgment of November 20th. This question is new; it was raised by Peru in its Note to Colombia of November 28th, 1950, and was submitted to the Court by the Application of Colombia of December 13th, 1950. There is consequently no *res judicata* upon the question of surrender.

According to the Havana Convention, diplomatic asylum is a provisional measure for the temporary protection of political offenders. Even if regularly granted it cannot be prolonged indefinitely, but must be terminated as soon as possible. It can, according to Article 2, paragraph 2, only be granted “for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety.”

The Court finds that the Convention does not give a complete answer to the question of the manner in which an asylum shall be terminated.

⁷ Here the Court referred to the Colombian alternative submission, and Peruvian submission II.

As to persons accused of or condemned for common crimes who seek refuge, Article I prescribes that they shall be surrendered upon request of the local government. For "political offenders" another method of terminating asylum is prescribed, namely, the grant of a safe-conduct for the departure from the country. But, under the terms of the Judgment of November 20th, a safe-conduct can only be claimed under the Havana Convention if the asylum has been regularly granted and maintained and if the territorial State has required that the refugee should be sent out of the country. For cases in which the asylum has not been regularly granted or maintained, no provision is made as to the method of termination. Nor is any provision made in this matter in cases where the territorial State has not requested the departure of the refugee. Thus, though the Convention prescribes that the duration of the asylum shall be limited to the time "strictly indispensable . . .," it is silent on the question how the asylum should be terminated in a variety of different situations.

As the Court pointed out in its Judgment of November 20th, the Havana Convention, the first article of which requires that persons accused of or condemned for common crimes shall be surrendered to the territorial authorities, does not contain any similar provision in regard to political offenders. This silence cannot be interpreted as imposing an obligation to surrender the refugee in case the asylum was granted to him contrary to the provisions of Article 2 of the Convention. Such an interpretation would be repugnant to the spirit which animated that Convention in conformity with the Latin-American tradition in regard to asylum, a tradition in accordance with which political refugees should not be surrendered. There is nothing in that tradition to indicate that an exception should be made where asylum has been irregularly granted. If it had been intended to abandon that tradition, an express provision to that effect would have been needed, and the Havana Convention contains no such provision. The silence of the Convention implies that it was intended to leave the adjustment of the consequences of this situation to decisions inspired by considerations of convenience or of simple political expediency. To infer from this silence that there is an obligation to surrender a person to whom asylum has been irregularly granted would be to disregard both the rôle of these extra-legal factors in the development of asylum in Latin America, and the spirit of the Havana Convention itself.

In its Judgment of November 20th the Court pointed out that, in principle, asylum cannot be opposed to the operation of justice. The safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals. Protection thus understood would authorize the diplomatic agent to obstruct the application of the laws of the country, whereas

it is his duty to respect them. The Court further said that it could not admit that the States signatories to the Havana Convention intended to substitute for the practice of the Latin-American republics a legal system which would guarantee to their own nationals accused of political offences the privilege of evading national jurisdiction. But it would be an entirely different thing to say that the State granting an irregular asylum is obliged to surrender the refugee to the local authorities. Such an obligation to render positive assistance to these authorities in their prosecution of a political refugee would far exceed the above-mentioned findings of the Court and could not be recognized without an express provision to that effect in the Convention.

Thus, the Havana Convention does not justify the view that the obligation incumbent on a State to terminate an asylum irregularly granted to a political offender, imposes a duty upon that State to surrender the person to whom asylum has been granted.

In its Judgment of November 20th the Court, in examining whether the asylum was regularly granted, found that the Government of Peru had not proved that the acts of which Haya de la Torre was accused, before asylum was granted to him, constituted common crimes. Moreover, when the Court considered the provisions of Article 2, paragraph 2, relating to political offenders, it held, on the basis of these provisions, that the asylum had not been granted in conformity with the Convention. It follows from these considerations that, so far as the question of surrender is concerned, the refugee must be treated as a person accused of a political offence. The Court has, consequently, arrived at the conclusion that the Government of Colombia is under no obligation to surrender Haya de la Torre to the Peruvian authorities.

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In its Judgment of November 20th, the Court held that the grant of asylum by the Government of Colombia to Haya de la Torre was not made in conformity with Article 2, paragraph 2 ("First"), of the Convention. This decision entails a legal consequence, namely that of putting an end to an illegal situation: the Government of Colombia which had granted the asylum irregularly is bound to terminate it. As the asylum is still being maintained, the Government of Peru is legally entitled to claim that it should cease.

But the latter Government adds in its Submission a demand that the asylum should cease "in order that Peruvian justice may resume its normal course which has been suspended." This addition appears to involve, indirectly, a claim for the surrender of the refugee. For the reasons given

⁸ Here the Court referred to Peruvian submission III, which Colombia asked the Court to reject.

above, this part of the Submission of the Government of Peru cannot be accepted.

The Court has thus arrived at the conclusion that the asylum must cease, but that the Government of Colombia is under no obligation to bring this about by surrendering the refugee to the Peruvian authorities. There is no contradiction between these two findings, since surrender is not the only way of terminating asylum.

Having thus defined in accordance with the Havana Convention the legal relations between the Parties with regard to the matters referred to it, the Court has completed its task. It is unable to give any practical advice as to the various courses which might be followed with a view to terminating the asylum, since, by doing so, it would depart from its judicial function. But it can be assumed that the Parties, now that their mutual legal relations have been made clear, will be able to find a practical and satisfactory solution by seeking guidance from those considerations of courtesy and good-neighbourliness which, in matters of asylum, have always held a prominent place in the relations between the Latin-American republics.

For these reasons,

THE COURT,

on the principal Submission of the Government of Colombia and the first Submission of the Government of Peru,

unanimously,

finds that it cannot give effect to these Submissions and consequently rejects them;

on the alternative Submission of the Government of Colombia and the second Submission of the Government of Peru,

by thirteen votes to one,⁹

finds that Colombia is under no obligation to surrender Víctor Raúl Haya de la Torre to the Peruvian authorities;

on the third Submission of the Government of Peru,

unanimously,

finds that the asylum granted to Víctor Raúl Haya de la Torre on January 3rd-4th, 1949, and maintained since that time, ought to have ceased after the delivery of the Judgment of November 20th, 1950, and should terminate.

⁹ As to the Peruvian Judge, the report adds: "M. ALAYZA Y PAZ SOLDÁN, Judge *ad hoc*, declares that if the Court had stated under the second point of the operative clause that Colombia was under no obligation, as the sole means of executing the Judgment, to surrender the refugee to the Government of Peru, he would have been in a position to concur in the opinion of the majority of the Court. But the brevity of the sentence employed, which may be misunderstood, prevents him from concurring in the opinion of the Court as a whole."

ANGLO-IRANIAN OIL CO. CASE. REQUEST FOR THE INDICATION OF INTERIM MEASURES OF PROTECTION (UNITED KINGDOM/IRAN). I.C.J. Reports, 1951, p. 89.

International Court of Justice, Order of July 5, 1951.

In the proceedings instituted before the Court by the Application of May 26, 1951,¹ by the United Kingdom against the Iranian Empire, pursuant to acceptance of the "Optional Clause" by both parties,² in the case of the Anglo-Iranian Oil Company, Ltd., the Court³ made the following Order:

Having regard to the Request dated June 22nd, 1951, submitted to the Court and filed in the Registry on that day whereby the United Kingdom Government—invoking Article 41 of the Statute and Article 61 of the Rules, and referring to the Application of May 26th, in which the United Kingdom Government had reserved the right to request the Court to indicate such interim measures—requested the Court to indicate that pending the final Judgment of the Court in the Anglo-Iranian Oil Company case:

¹ For factual background of dispute, see current note above, p. 749.

² The British Declaration of Sept. 19, 1929 (ratification deposited Feb. 5, 1930), accepted compulsory jurisdiction for a period of ten years, and thereafter until notice of termination, "over all disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to the said ratification:

"other than disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement; and

"disputes with the Government of any other Member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree; and

"disputes with regard to questions which by international law fall exclusively within the jurisdiction of the United Kingdom;"

By two Declarations, respectively, of Feb. 28, 1940, Great Britain terminated the Declaration of Sept. 19, 1929, and accepted compulsory jurisdiction for a period of five years from Feb. 28, 1940, and thereafter until notice of termination, over all disputes arising after Feb. 5, 1930, with regard to situations or facts subsequent to the same date. This Declaration, which was not subject to ratification, excluded from the Court's compulsory jurisdiction the three types of disputes described in the Declaration of Sept. 19, 1929 (quoted above), and also "disputes arising out of events occurring at a time when His Majesty's Government in the United Kingdom were involved in hostilities;"

The Iranian Declaration of Oct. 2, 1930 (ratification deposited Sept. 19, 1932), accepted compulsory jurisdiction "in any disputes arising after the ratification of the present declaration with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration, with the exception of:

"(a) disputes relating to the territorial status of Persia, including those concerning the rights of sovereignty of Persia over its islands and ports;

"(b) disputes in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement;

"(c) disputes with regard to questions which, by international law, fall exclusively within the jurisdiction of Persia."

³ President Basdevant, Vice President Guerrero, and Judges Alvarez, Hackworth, Zoričić, DeVisscher, McNair, Klaestad, Read, and Hsu Mo. Judges Winiarski and Badawi Pasha dissented.

- (a) The Imperial Government of Iran should permit the Anglo-Iranian Oil Company, Limited, its servants and agents, to search for and extract petroleum and to transport, refine or treat in any other manner and render suitable for commerce and to sell or export the petroleum obtained by it, and generally, to continue to carry on the operations which it was carrying on prior to the 1st May, 1951, free from interference calculated to impede or endanger the operations of the Company, by the Imperial Government of Iran, their servants or agents, or any Board, Commission, Committee, or other body nominated by them.
- (b) The Imperial Government of Iran should not by any executive or legislative act or judicial process hinder or prevent or attempt to hinder or prevent the Anglo-Iranian Oil Company, Limited, its servants or agents, in or from continuing to carry on its operations as aforesaid.
- (c) The Imperial Government of Iran should not by any executive or legislative act or judicial process sequester or seize or attempt to sequester or seize or otherwise interfere with any property of the Anglo-Iranian Oil Company, Limited, including (but without prejudice to a decision on the merits of the case) any property which the Imperial Government of Iran have already purported to nationalise or otherwise to expropriate.
- (d) The Imperial Government of Iran should not by any executive or legislative act or judicial process sequester or seize or attempt to sequester or seize any monies earned by the Anglo-Iranian Oil Company, Limited, or otherwise in the possession or power of the Anglo-Iranian Oil Company, Limited, including (but without prejudice to a decision on the merits of the case) any monies which the Imperial Government of Iran have purported to nationalise or otherwise to expropriate or any monies earned by means of property which they have purported so to nationalise or otherwise to expropriate.
- (e) The Imperial Government of Iran should not by any executive or legislative act or judicial process require or attempt to require the Anglo-Iranian Oil Company, Limited, to dispose of the monies referred to in sub-paragraph (d) above otherwise than in accordance with the terms of the Convention of 1933 or of any measure to be indicated by the Court.
- (f) The Imperial Government of Iran should ensure that no other steps of any kind are taken capable of prejudicing the right of the Government of the United Kingdom to have a decision of the Court in its favour on the merits of the case executed, should the Court render such a decision.
- (g) The Imperial Government of Iran and the Government of the United Kingdom should ensure that no step of any kind is taken capable of aggravating or extending the dispute submitted to the Court, and in particular, the Imperial Government of Iran should abstain from all propaganda calculated to inflame opinion in Iran against the Anglo-Iranian Oil Company, Limited, and the United Kingdom.

Whereas, on the day on which the Request for the indication of interim measures was filed, it was transmitted to the Iranian Government and the

submissions made therein were communicated by telegraph to the said Government;

Whereas the Registry, referring to Article 41, paragraph 2, of the Statute, notified the Secretary-General of the United Nations of the said Request, and, in accordance with Article 40, paragraph 3, of the Statute communicated it to the Members of the United Nations through the Secretary-General, and to the other States entitled to appear before the Court;

Having regard to the message transmitted by telegraph by the President of the Court on June 23rd to the Prime Minister and to the Minister for Foreign Affairs in Iran, which was in the following terms:

“Court being due to meet to consider Request for indication interim measures of protection filed June 22nd by United Kingdom agent, it is my duty in accordance with Article 61 of the Rules to take such measures as appear necessary to me to enable the Court to give an effective decision. For this purpose I have honour suggest to Your Excellencies that Imperial Government issue appropriate instructions to avoid all measures which might render impossible or difficult the execution of any judgment which the Court might subsequently give and to ensure that no action is taken which might aggravate the dispute submitted to Court. Any measures taken by Imperial Iranian Government for this purpose would in no way prejudice such representations as that Government may deem it appropriate to make to Court either in proceedings on Request for interim measures in which both parties will have right to be heard at hearing on June 30th or subsequently in proceedings on Application filed May 26th by the United Kingdom.”

Having regard to the reply to this message, transmitted by telegraph on June 29th to the Iranian Legation at The Hague, and, on the same day, delivered to the President of the Court by the Iranian Minister at The Hague, filed and communicated to the Agent for the United Kingdom Government;

Having regard to the final text of the said reply, consisting of a message signed “B. Kazemi, Minister for Foreign Affairs of Iran,” followed by a statement together with three annexes delivered to the President of the Court on June 30th by the Iranian Minister at The Hague, which was also communicated to the Agent for the United Kingdom Government;

Whereas the said reply stated:

“In view of the foregoing considerations the Iranian Government hopes that the Court will declare that the case is not within its jurisdiction because of the legal incompetence of the complainant and because of the fact that exercise of the right of sovereignty is not subject to complaint. Under these circumstances the request for interim measures of protection would naturally be rejected.”

Whereas on June 23rd, the day following the filing of the Request for the indication of interim measures of protection, the United Kingdom Government, through its duly authorized Agent, and the Iranian Government,

through its Minister for Foreign Affairs, were informed that the Court would fix a hearing for the purpose of giving the Parties an opportunity of presenting their observations on the subject of the Request;

Whereas, upon the opening of the hearing fixed for this purpose, the President of the Court took note of the presence in Court of Sir Eric Beckett, K.C.M.G., K.C., Legal Adviser to the Foreign Office, and of the Right Honourable Sir Frank Soskice, K.C., M.P., Attorney-General; Professor H. Lauterpacht, K.C., Professor of International Law at Cambridge University; Mr. A. K. Rothnie, Eastern Department, Foreign Office; and Messrs. H. A. P. Fisher and D. H. N. Johnson, Counsel;

Whereas the Iranian Government was not represented at this hearing;

Having heard Sir Frank Soskice on behalf of the United Kingdom Government, on the request for the indication of interim measures of protection;

Whereas the submissions in the request of the United Kingdom Government, quoted above, were maintained in the course of the hearing;

Whereas in its message of June 29th, 1951, the Iranian Government stated that it rejected the Request for the indication of interim measures of protection presented by the United Kingdom Government on the grounds principally of the want of competence on the part of the United Kingdom Government to refer to the Court a dispute which had arisen between the Iranian Government and the Anglo-Iranian Oil Company, Limited, and of the fact that this dispute pertaining to the exercise of the sovereign rights of Iran was exclusively within the national jurisdiction of that State and thus not subject to the methods of settlement specified in the Charter;

Whereas it appears from the Application by which the Government of the United Kingdom instituted proceedings, that that Government has adopted the cause of a British company and is proceeding in virtue of the right of diplomatic protection;

Whereas the complaint made in the Application is one of an alleged violation of international law by the breach of the agreement for a concession of April 29th, 1933, and by a denial of justice which, according to the Government of the United Kingdom, would follow from the refusal of the Iranian Government to accept arbitration in accordance with that agreement, and whereas it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international jurisdiction;

Whereas the considerations stated in the preceding paragraph suffice to empower the Court to entertain the request for interim measures of protection;

Whereas the indication of such measures in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction;

Whereas the object of interim measures of protection provided for in the

Statute is to preserve the respective rights of the Parties pending the decision of the Court, and whereas from the general terms of Article 41 of the Statute and from the power recognized by Article 61, paragraph 6, of the Rules of Court, to indicate interim measures of protection *proprio motu*, it follows that the Court must be concerned to preserve by such measures the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent;

Whereas the existing state of affairs justifies the indication of interim measures of protection;

For these reasons,

THE COURT

Indicates, pending its final decision in the proceedings instituted on May 26th, 1951, by the Government of the United Kingdom of Great Britain and Northern Ireland against the Imperial Government of Iran, the following provisional measures which will apply on the basis of reciprocal observance:

1. That the Iranian Government and the United Kingdom Government should each ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of any decision on the merits which the Court may subsequently render;

2. That the Iranian Government and the United Kingdom Government should each ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court;

3. That the Iranian Government and the United Kingdom Government should each ensure that no measure of any kind should be taken designed to hinder the carrying on of the industrial and commercial operations of the Anglo-Iranian Oil Company, Limited, as they were carried on prior to May 1st, 1951;

4. That the Company's operations in Iran should continue under the direction of its management as it was constituted prior to May 1st, 1951, subject to such modifications as may be brought about by agreement with the Board of Supervision referred to in paragraph 5;

5. That, in order to ensure the full effect of the preceding provisions, which in any case retain their own authority, there should be established by agreement between the Iranian Government and the United Kingdom Government a Board to be known as the Board of Supervision composed of two Members appointed by each of the said Governments and a fifth Member, who should be a national of a third State and should be chosen by agreement between these Governments, or, in default of such agreement, and upon the joint request of the Parties, by the President of the Court.

The Board will have the duty of ensuring that the Company's operations are carried on in accordance with the provisions above set forth. It will, *inter alia*, have the duty of auditing the revenue and expenses and of ensuring that all revenue in excess of the sums required to be paid in the

course of the normal carrying on of the operations and the other normal expenses incurred by the Anglo-Iranian Oil Company, Limited, are paid into accounts at banks to be selected by the Board on the undertaking of such banks not to dispose of such funds except in accordance with the decisions of the Court or the agreement of the Parties.⁴

War—enemy property—"freezing" controls—attachments

ZITTMAN v. McGRATH. 71 Sup. Ct. 832; 341 U. S. 446.

United States Supreme Court, May 28, 1951. Jackson, J.

After the outbreak of war with Germany in 1941 holders of claims against the Deutsche Reichsbank levied attachments on the Reichsbank's accounts with Chase National Bank in New York. These attachments were followed by State court actions and default judgments against the Reichsbank, which remained unsatisfied because the attached funds had been "frozen" under Federal foreign funds controls pursuant to Executive Orders 8389 and 8785. In 1946 the Alien Property Custodian issued orders vesting obligations owed to Reichsbank by the Chase Bank, and the latter stated that it could not release the accounts because of the outstanding attachments.

Thereafter the Custodian petitioned the District Court for the Southern District of New York for a declaratory judgment that the attachment creditors "obtained no lien or other interest in" the attached accounts and that he was entitled to the entire balances in the accounts. The District Court granted the relief sought,¹ and this was affirmed² on the authority of *Propper v. Clark*.³ On certiorari, the Supreme Court reversed this decision, holding that the State attachments were not void but were good as against the debtors, though subject to Federal licensing before they could be satisfied by transfer of title or possession. Leaning heavily on the Government's position in *Commission for Polish Relief v. Banca Nationala a Rumaniei* and the decision in that case,⁴ the Court pointed out that one purpose of foreign funds controls was to preserve and distribute blocked assets for the benefit of American creditors, which in case of disputed claims necessitated judicial determination of the validity of such claims. Furthermore, the chief purpose was to prevent funds from going to the enemy or to persons other than their rightful owners, and giving effect to these attachments would do this, since "The sole beneficiaries are American citizens whose

⁴ By order dated July 5, 1951, the Court fixed the following time-limits for the filing of written pleadings: Sept. 3, 1951, for the memorial of the United Kingdom Government; Dec. 31, 1951, for the counter-memorial of the Government of Iran (I.C.J. Reports, 1951, p. 100); by order of Aug. 22, 1951, the time-limits were extended to Oct. 10, 1951, for the deposit of the U. K. memorial, and to Jan. 10, 1952, for the deposit of the Iranian counter-memorial.

¹ 82 F. Supp. 740 (1948).

² 182 F. (2d) 349 (1950).

³ 337 U. S. 472 (1949); this JOURNAL, Vol. 44 (1950), p. 181.

⁴ 288 N. Y. 332, 43 N. E. (2d) 345 (1942).

liens are not derived from the enemy but are adverse to any enemy interests.” The Court distinguished *Propper v. Clark* on the ground that there the receiver “was a special statutory receiver which state law purported to vest with both title and right to possession, which, in case of blocked assets of a foreign corporate debtor, would obviously defeat the scheme of federal controls.”

Here the Custodian had only sought to vest the “right, title, and interest” of the German bank, and the attachments were therefore not canceled by the vesting order. As to the attachments the Court added:

But, of course, as against the Custodian, exercising the paramount power of the United States, they do not control or limit the federal policy of dealing with alien property and do not prevent a *res vesting*⁵ . . . if the Custodian sees fit to take over the entire fund for administration under the Act. In such case, all federal questions as to recognition by the Custodian of the state law lien, or priority of payment, are reserved for decision if and when presented in accordance with the Act.

This result . . . in no way impairs federal control over alien property, since the petitioners admit that they cannot secure payment from the attached frozen funds without a license from the Custodian. . . .⁶

⁵ This was held in the companion case of *Zittman v. McGrath*, 341 U. S. 471 (May 28, 1951), involving Reichsbank accounts with the Federal Reserve Bank of New York, where the Custodian had ordered the latter bank to turn over the property for administration. Jackson, J., said that “the Custodian has power to possess himself of these funds and to administer them. To hold otherwise would be incompatible with the federal program.”

⁶ Douglas, J., concurred in a separate opinion; Clark, J., took no part in the decision; and Reed and Burton, JJ., dissented in part in an opinion by the former. See also *McCloskey v. McGrath*, 341 U. S. 475 (May 28, 1951), involving sheriff's fees in these cases.

Shinsaku Nagano v. McGrath, 187 F. (2d) 753 (7th Ct., Feb. 26, 1951) held a resident Japanese merchant to be entitled to recover from the Custodian shares of stock in his business which he had purported to give to his wife, despite the Custodian's contention that there was an equitable estoppel against plaintiff. In *Kaku Nagano v. McGrath*, 187 F. (2d) 759 (7th Ct., Feb. 26, 1951) the wife was held entitled to recover the shares which had become hers and were taken by the Custodian, though she had retained Japanese citizenship and had lived in Japan most of the time since 1924 in order to look after children there who were not American citizens and not eligible to come to the United States. She was held to have retained “residence” in the United States with her husband, where she had lived more than seven years. The court held that her recovery was not prevented by the amendment of July 3, 1948, which provided that no property of “any national” of Japan, vested in or transferred to any government official pursuant to the Trading with the Enemy Act, should be returned. The court said that she was “the owner of innocent American property, a friendly alien permanent resident of the United States and as such, entitled to Constitutional guarantees.” The court held that the 1948 statute did not repeal § 9 (a), which gave the right to recovery from the Custodian, stating that “repeals by implication are never favored” and that Congress had refused to enact legislation specifically repealing that section. The court added: “though literally speaking, plaintiff is a citizen of Japan, she is not a citizen within the meaning of the word and its connotation recognized by judicial decisions. We ordinarily think of a citizen as one who owes allegiance to a state and has a reciprocal right to protection

Non-recognition—resulting refusal to recognize acts of unrecognized government

LATVIAN STATE CARGO & PASSENGER S.S. LINE *v.* McGRATH. 188 F. (2d) 1000.

U. S. Ct. of Appeals, Dist. of Col., Feb. 23, 1951. Prettyman, Ct. J.

Plaintiff, a public corporation organized under the U.S.S.R., sued the Attorney General as successor to the Alien Property Custodian to recover the proceeds of insurance and earnings of three vessels sunk by enemy action in 1942. These vessels belonged to Latvian nationals resident in Latvia but had not been in Latvian waters since 1939. In 1940 armies of the Soviet Union occupied Latvia, a Latvian Soviet Socialist Republic was created, and this Republic was incorporated in the Soviet Union. By decrees of the Latvian Soviet Socialist Republic and the U.S.S.R., the ships were nationalized and vested in plaintiff. After the vessels were sunk, and while Latvia was under the control of invading German armies, the Alien Property Custodian vested the proceeds of insurance. The trial court granted defendant's motion for summary judgment.

Affirming this decision, the court pointed out that affidavits of the Secretary of State showed that the United States had not recognized the incorporation of Latvia by the Soviet Union, nor the legality of the nationalization decrees or of any acts of the Soviet regime in Latvia; and that the legal existence of treaties between Latvia and the United States had not been affected by these acts of the Soviet regime. The court said:

we do not have before us a mere failure to recognize in the absence of a strong executive policy against condoning in any way the Soviet occupation of Latvia. It might well be that in the absence of such a policy the usual rules applicable under the established doctrines of conflicts of laws would apply. Thus, in *Compania Espanola de Navegacion Maritima, S.A. v. Navemar*¹ and in *M. Salimoff & Co. v. Standard Oil*

by it. It is obvious that plaintiff, a loyal American resident, unable to secure citizenship in this country, . . . owed no allegiance to Japan and had no reciprocal rights to protection by it. . . . Citizenship conveys the idea of membership in a nation, yet under the averments, we think it can not be said that plaintiff is, in any true sense, a member of the nation of Japan. Though ineligible to citizenship until recently, she was and is a permanent resident, owning untainted American property. Her position, we believe, is not within the conception of citizenship of a foreign nation which Congress had in mind in defining a national."

Other cases involving enemy property controls included *Kaufman v. Société Internationale*, 188 F. (2d) 1017 (Dist. Col., April 5, 1951); *Knitting Machines Corp. v. Hayward Hosiery Co.*, 95 F. Supp. 510 (D. Mass., Oct. 30, 1950); *Lippmann v. McGrath*, 94 F. Supp. 1016 (S. D. Ill., Dec. 28, 1950); *First National Bank of Portland v. McGrath*, 97 F. Supp. 77 (D. Ore., March 16, 1951); *Fontheim v. Legerlotz*, 102 N. Y. S. (2d) 847 (Sup. Ct., N. Y. County, Jan. 30, 1951); *In re Yokohama Specie Bank*, 103 N. Y. S. (2d) 228 (Sup. Ct., N. Y. County, Feb. 9, 1951).

¹ 303 U. S. 68 (1938); this JOURNAL, Vol. 32 (1938), p. 381.

Co.,² the State Department refused to certify a policy of hostility to decrees of the unrecognized governments, and the courts accordingly applied those doctrines in arriving at their decisions. Even granting the application of such doctrines, however, there is no assurance that appellant should prevail here. There is, for example, the view suggested by Judge Goodrich, concurring in *The Maret*,³ that in the absence of recognition of a foreign government the courts might deny effect to an act of that government which purports to change the ownership of a chattel absent from its borders. In a similar vein is the statement in *Compania Espanola v. Navemar* to the effect that, where confiscatory decrees are *in invitum*, actual possession by some act of physical dominion or control in behalf of the confiscating government is necessary. No such showing was made in the case at bar. And, furthermore, there is the possible view that, since the nationalization decrees here involved were confiscatory and thus contrary to the public policy of this country, our courts would in no event give them effect. In the view we take, however, it is unnecessary to consider these possibly applicable rules.

In the case at bar it appears that the non-recognition of the nationalization decrees was the result of a deliberate policy of the executive branch of the Government.

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We are of opinion that when the executive branch of the Government has determined upon a foreign policy, which can be and is ascertained, and the non-recognition of specific foreign decrees is deliberate and is shown to be part of that policy, such non-recognition must be given effect by the courts. The rule applicable in such circumstances is the same rule applicable to an act of recognition. Any other treatment of a deliberate policy and act of non-recognition would reduce the effective control over foreign affairs by the executive branch to a mere effectiveness of acts of recognition. The control of the executive branch over foreign affairs must necessarily be broader than that.

While this specific point was not before the Court in *United States v. Pink*⁴ . . . the view which we have expressed was definitely indicated in the opinions in that case.

International agreements—claims release—effect on right to sue U. S. OZANIC v. UNITED STATES. 188 F. (2d) 228.

U. S. Ct. of Appeals, Second Circuit, April 10, 1951. L. Hand, C. J.

Ozanic, as master of the Yugoslav ship, *Petar*, sued the United States under the Public Vessels Act to recover for her loss in 1942 in collision with a Government-owned tanker, both vessels being found at fault. In December, 1946, the Yugoslav Government nationalized the corporate owner of the *Petar*, making this claim state property. Under a 1947 agreement between the British and Yugoslav governments and certain private parties, the Yugoslav Government assigned this claim to a British company, which

² 262 N. Y. 220, 186 N. E. 679 (1933). ³ 145 F. (2d) 431 (C. C. A., 3d, 1944).

⁴ 315 U. S. 203 (1942); this JOURNAL, Vol. 36 (1942), p. 309.

sought to intervene in the American suit. On July 19, 1948, the American Secretary of State and the Yugoslav Deputy Finance Minister entered into an agreement for Lend-Lease settlements, under which the Yugoslav Government released claims against the United States arising out of maritime collisions, including that for the *Petar*. The District Court ordered the decree for *Ozanic* marked "satisfied" and denied the British company the right to intervene. Affirming, Judge Hand rested on the 1948 agreement and said in part:

Although the agreement of 1948 was not a treaty, and did not in terms profess to repeal the consent of the United States to be sued which the Public Vessels Act had granted, we regard it as overriding that consent, and asserting the immunity of the United States from suit upon any claims whose release was part of the consideration of the United States for the release of its "Lend-Lease" claims against the Yugoslav Government. The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies. The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations . . . even though the Agreement of 1948 stood only upon the constitutional power of the President to come to an accommodation with a foreign government upon mutual claims between the two nations, it would suffice to withdraw the consent to be sued. . . .¹

The agreement, however, was further authorized under the Lend-Lease Act of 1941.

Exchanges of notes—question whether effective as domestic law

BENZONI *c.* DAVIDOVICI. Sirey, 1951.2.79.²

France, Tribunal of Bonneville, March 1, 1950.

Although under French law certain tenants are not entitled to renewals of leases, bilateral treaties with various states give their nationals this right and are applied in French courts.³ In this case Italian nationals were denied this right, however, which they claimed, not under treaty, but pursuant to an exchange of notes between France and Italy (ratified by French decree in 1947), under which Italian nationals were accorded most-favored-nation treatment in matters of establishment in France. The court did not regard this exchange of notes as equivalent to a treaty for purposes of the French courts, pointing to the fact that it "was not the object of a ratification by the French Parliament."

¹ *I.e.*, the consent to be sued given by the United States under the Public Vessels Act.

² With note strongly critical of the decision.

³ Regarding the effect of treaties in French law, see Preuss, this JOURNAL, Vol. 44 (1950), p. 641, at pp. 647 ff.

Nationality—effect of abrogation of Nazi denationalization decrees

ÉPOUX GUNGUÈNE c. DLLE. FALK ET AUTRES. Sirey, 1951.I.89.

France, Court of Cassation, December 20, 1950.

Respondent, a German Jewish woman living in France, was deprived of German nationality by the German decree of November 25, 1941. In 1945 she sought to recover possession of rented property in Paris, to which she was entitled under French law unless she were a German national. After the occupation of Germany in 1945, Allied Military Government laws and the Allied Control Council abrogated the Nazi "racial legislation," including that depriving of their German nationality Jewish persons who had emigrated.

The Civil Tribunal of the Seine held that her German nationality was thus automatically restored to respondent. The Court of Appeal reversed. Rejecting the appeal against this decision of the Court of Appeal, the Court of Cassation held that abrogation of the Nazi "racial legislation" did not result in automatic recovery of German nationality, and regarded her as having become stateless under the decree of November 25, 1941.¹ It said in part:

The provisions which abrogate the racial laws, as they have been interpreted, notably by the Allied Control Council on July 24, 1946 and July 30, 1947, have not resulted in *imposing* German nationality on stateless refugees of German origin.

*Sovereign state plaintiff—security for costs—treaty interpretation*REPUBLIC OF RUMANIA v. CONSTANTINESCU.² Schweizerische Juristen-Zeitung, May 15, 1951, p. 157.

Switzerland, High Court of Canton of Zürich, January 18, 1951.

The law of Zürich requiring the plaintiff who lacks residence in Switzerland to furnish security for costs (*cautio judicatum solvi*) was held applicable when Rumania brought in the Zürich courts an action for damages for alleged breach of contract. The court said that, according to generally prevailing principles of public and private international law, a foreign state instituting proceedings in a private matter (*acta gestionis*), and not acting as a sovereign, submits to the procedural rules of the forum.

Although both Rumania and Switzerland were parties to the Hague Convention of July 17, 1905, on Civil Procedure,³ under Article 17 of which nationals of the contracting states were exempted from the requirement of giving such security when suing in any contracting state, yet this convention was held to apply only to suits by *nationals* and not to those in which the contracting states themselves are plaintiffs. The discussions leading up

¹ It appeared that respondent was naturalized as a French citizen on March 24, 1946, but the court did not rely on this factor.

² Based on ms. digest by Dr. Konrad Bloch of Zürich.

³ 99 British and Foreign State Papers 990.

to the convention were said to indicate this interpretation. Support was also found in Article 18, under which the contracting states agreed to enforce judgments regarding costs and expenses arising from proceedings in other contracting states in which their nationals were exempted from furnishing security; this could only apply to suits by nationals, since sovereign immunities prevented enforcement of such judgments against states themselves,³ and if Article 18 refers only to nationals and not to states, then Article 17 likewise cannot apply to foreign states.

INTERNATIONAL COURT OF JUSTICE

Calendar as of October 1, 1951

1. Greece-United Kingdom: AMBATIELOS CASE.

May 18, 1951.—Order fixing time-limits for presentation of Greek Memorial and United Kingdom Counter-Memorial; the time-limits were later extended by order of July 30, 1951, to expire on November 15, 1951. The proceedings in this case were instituted by an application by Greece on April 9, 1951.

2. France-United States: RIGHTS OF U. S. NATIONALS IN MOROCCO.

June 25, 1951.—Order fixing August 6, 1951, as time-limit for presentation of French observations on the preliminary objection advanced by the United States on June 21, 1951. The proceedings in this case were instituted by an application by France on October 28, 1950.

3. United Kingdom-Iran: ANGLO-IRANIAN OIL COMPANY CASE.

July 5, 1951.—Order indicating interim measures, in response to a request made by the United Kingdom on June 22, 1951. The proceedings in this case were instituted by an application by the United Kingdom on May 19, 1951.

July 5, 1951.—Order fixing time-limits for presentation of United Kingdom Memorial and Iranian Counter-Memorial, the later expiring December 3, 1951.

August 22, 1951.—Order extending time-limits to October 10, 1951, for United Kingdom Memorial, and January 10, 1952, for Iranian Counter-Memorial.

4. United Kingdom-Norway: ANGLO-NORWEGIAN FISHERIES CASE.

September 25, 1951.—Oral proceedings begun. The proceedings in this case were instituted by an application by the United Kingdom on September 28, 1949.

M. O. H.

³ The court referred, *inter alia*, to E. W. Allen, *The Position of Foreign States Before National Courts* (1933), pp. 26, 140, 170; and to the Harvard Research in International Law, "Competence of Courts in Regard to Foreign States," this JOURNAL, Supp., Vol. 26 (1932), p. 649.

BOOK REVIEWS AND NOTES

International Law. Vol. I (2nd ed.). By Georg Schwarzenberger. London: Stevens & Sons, 1949. pp. liv, 682. Appendices. Index. £3/3s.

The second edition of Volume I of this useful work—dealing with “International Law as Applied by International Courts and Tribunals”—has been published prior to the publication of the second volume, which will treat of “International Law as Applied in British State Practice” and of the third volume, which will deal with “International Law as Applied by the Courts within the British Commonwealth and Empire.” The new edition includes an interesting Introduction based upon Dr. Schwarzenberger’s article “The Inductive Approach to International Law” which appeared in *The Harvard Law Review*. A new chapter on “War Crimes” has been added as a result of the Nuremberg Judgment. New or rewritten sections have been incorporated in about half of the chapters of the book. A “Selected Bibliography on International Law as Applied by International Courts and Tribunals,” prepared by Mr. L. C. Green, Lecturer in International Law and Relations at University College, London, has been appended (pp. 631–667).

A work on international law which confines its scope to an analysis of the jurisprudence of international tribunals will inevitably fail to deal comprehensively with the subject of international law. For example, in such fields as diplomatic immunity and the recognition of new states and governments, there is no international jurisprudence. However, no one acquainted with the decisions of national courts and the documented practice of states in these fields would conclude that the absence of a jurisprudence of international courts was the equivalent of an absence of international law. Dr. Schwarzenberger is fully aware of the deficiencies and gaps inherent in his method in Volume I. However, he foresaw the desirability of a study which, highlighting the richness of international adjudication in certain fields, would also reveal how barren were such attempts and results in other fields; and this reviewer can testify from his own experience with the volume to its great utility. It has been an indispensable aid in research and in the classroom.

International lawyers will look forward with anticipation to the publication of Dr. Schwarzenberger’s volumes on British practice and national jurisprudence in fields of international law. Nothing comparable to the *Digests of International Law* of John Bassett Moore and Green H. Hackworth has been published for any country other than the United States. It would be tremendously useful if the United Nations were to encourage the undertaking of comparable *Digests* for other states.

HERBERT W. BRIGGS

Éléments de Droit International Public. By Jean L'Huillier. Paris: Editions Rousseau et Cie., 1950. pp. vii, 432. Index.

This manual by a jurist who has been associate professor at Poitiers since 1940 is intended as a textbook for the French student. It is admirably adapted for the purpose. If the publisher has an idea that L'Huillier's book may be a successor to the *Manuel* of Bonfils and Fauchille, he may prove not to be wrong.

The positive and present rules of international law are the author's theme and his statement of them is arranged as of now. The three parts into which he divides the material are the "Structure of International Society," the "Sources of International Law," and "International Juridical Relations." In an introduction and nine chapters, in 719 sections, are recited both the accepted rules of international law and statements of most of the debated theories by a teacher with a decade of experience at the University of Poitiers. Seldom going back of the monographs of the *Recueil des Cours* of the Academy of International Law for authority, the emphasis in these pages is placed on rules of positive law having a "certitude which presumes the official recognition of their validity."

The schematic description of the contents makes the book seem almost too simple even to embrace the "elements" of the subject, yet a glance at the index will satisfy almost anyone that L'Huillier has included his pet point. Though the coverage is comprehensive enough to be a "treatise," the text is concise enough to be frequently aphoristic. The gnomic character of the exposition makes it declaratory of rules and for the most part precludes citation of precedents or cases. The book is a pedagogical essay, not a compilation.

The author holds that the technique of international law implies the primacy of positive law, lacking efficiency because of the deficiency in international executive organization. Instead of riding the theses affected by various schools, he rather overrides them. Dealing with the natural law thesis, the solidarist, voluntarist, and normative doctrines, he leans to the latter for this perspicacious reason: "Any rule of conduct which has not received the consent, express or tacit, effective or presumptive, of the members of the international society cannot be considered as belonging to positive international law."

The "Structure of International Society," according to Part I of the work (138 pages), consists of the state, the subjects of international law other than the state, and the collective international institutions. The second part (70 pages), the "Sources of International Law," has two chapters on international treaties and the unwritten sources of international law, which are custom, supplementary and auxiliary sources (general principles of law, jurisprudence and doctrine). Four chapters make up the third part (174 pages), "International Juridical Relations," devoted to regula-

tion of the internal competence of the state, international responsibility, and international disputed claims. This framework in which the content of international law is placed results from the author's own analysis of the subject-matter. The law of war, which once was half a treatise, is compressed into 48 pages in the chapter entitled "External Competence of the State," which is exercised through application of the right to negotiate, the right of legation, and the right of war.

L'Huillier accomplishes the amazing feat of discussing recognition of a state and of a government without confusing the two. To be sure, recognition of a state is discussed in sections 73-86 and that of a government in sections 457-460, but he also miraculously keeps the ideas separate and straight. Some, he says, prefer a theory of state recognition as attribution of personality, others prefer a declarative theory; both are subject to objections of equal weight stemming from the contradiction between the universality of international society and the sovereignty or independence of states. Recognition of states is discretionary for existing states and is not subject to any condition of form, but may be individual or collective. Recognition of a government is simply declarative and is a consequence of the continuity of states. When the stability and responsibility of a government are no longer in doubt "recognition becomes an obligation for foreign states."

We read concerning the lapse of treaties that *rebus sic stantibus* has the general adherence of states and is given explicit application in some international conventions. But, if the principle is generally admitted, its application encounters certain difficulties. Occurrence of unexpected economic, political, social, or military circumstances different from those which existed at the conclusion of a treaty cannot of itself extinguish the treaty. Unilateral repudiation is not justified by the principle, which should lead to new agreement by revision or arbitration.

Whether L'Huillier has done his book from experience in teaching the subject or under the impulse of his aptitude for analysis, he has produced a notably fresh presentation of the whole subject-matter of international law. Mr. L'Huillier is 46 years old and, after taking his D. Jur. S. and teaching at the Lycée Louis le Grand, has been at the University of Poitiers since 1940.

DENYS P. MYERS

Law and Society in the Relations of States. By P. E. Corbett. New York: Harcourt, Brace & Co., 1951. pp. xii, 338. Index. \$4.75.

Professor Corbett lays all his cards on the table in his first chapter. He believes that the influence of legal ideas in the relations of states is grossly overrated in the traditional literature of international law and is, at the same time, excessively discounted by the Machiavellis of our time (p. 3).

He attempts an unprejudiced evaluation, beginning with the study of the origin and development of the principal theories of international law, testing familiar patterns of international practice for traces of "normative effect" (p. 8), and reaching the conclusion that the effort to classify international usages as law "involves wasteful self-deception and misdirection of energy, and leads to false expectations on the part of the public" (p. 11). The weakness of international law is due, in his opinion, to "the lack of social solidarity among even the most highly civilized States"; we need "a tougher sort of institutions based upon interests . . . clearly defined and . . . broadly and firmly apprehended"; "the future of international law is one with the future of international organization" (p. 12).

The author's thesis is well argued. He notes with regret that "the dominant characteristic of our world is conflict, not consensus" (p. 50), and that "any sense of community shared by all the world's States is weaker than their sense of conflict" (p. 75). He finds that the principles of conduct known as international law "vary greatly in the degree of acceptance which they have won" and are "in constant process of modification by new pressures" (p. 88). He examines in detail the manner in which these principles are applied with reference to "the more important foci . . . : acquisition and loss of territory, territorial waters and open sea, sovereignty in the air, immunities of States and their agents, jurisdiction and extradition, responsibility for injuries to aliens, war, and neutrality" (pp. 88-257). He observes that "on paper . . . the United Nations is a highly developed society of States" (p. 259), but that "when we turn from the text to the conduct of the organization and of its Members, the conviction of society fades" (p. 260). Against the background of struggle between "two hostile armed camps preparing for eventual war," feared by both sides and desired by neither, "the technical agencies of the United Nations . . . address themselves with varying success to the social and economic problems of what is formally a society of States though not a world society" (p. 261). The International Law Commission of the United Nations, engaged in the "harmless activity" of "elaborating and refining abstract rules for the government of States," might, he suggests, make "a durable contribution to the development of a world legal order" if it would "transform itself into a body studying the fundamental conditions of such development" (p. 278).

One ray of light pierces the gloom of the situation portrayed by the author. In a short concluding chapter, "New Directions" (pp. 287-300), we are told, somewhat surprisingly, that "the solution (if there is one)" of the problem of international organization under law "lies . . . in the direction of a code of minimum human rights, voluntarily accepted and made the law of a world-society recognizing individuals as members" (p. 293). The society that "we should be offering to the world, even when direct progress is stopped by fundamental disagreements among the greatest

States . . . is a society in which the welfare of the human individual would be the acknowledged primary object, and in which all organization for preventing violence and raising standards of life would be regarded as means to this end" (p. 295). "This," according to Professor Corbett (p. 298), "is the way to bring international organization out of the high clouds of diplomacy and to win for it the common loyalty which is the firm foundation for authority."

EDGAR TURLINGTON

La Société Internationale. By Theodore Ruysen. Paris: Presses Universitaires de France, 1950. pp. 240. Fr. 44.

Theodore Ruysen in *La Société Internationale* compresses an absorbing outline of the history of international relations into some two hundred pages of text. Many fresh ideas and trenchant criticisms of existing international institutions and recent political developments make it a provocative and valuable contribution to the literature. The book is more than a history, as it attempts to give a sociological analysis of the development of international society.

Ruysen first examines the fundamental factors underlying international society. He finds them to be the physical environment, racial characteristics, population, and human sociability. While 2,300,000,000 human beings, distributed unevenly over the face of the earth, are presumably capable of entering social relations with each other, there is no evidence that they have realized an integral society. Ruysen then searches for the beginnings of such a society. The ideas of humanity, the human community, or international society, are only abstractions. Ruysen feels that they can become dynamic only through a myth, like the religious belief in the brotherhood of man or the philosophic conception of the eminent integrity of the human person. If this is granted, it is clear that the factor which can contribute most efficaciously toward the constitution of an integral human society is an intellectual one. While ideas may lead the world, it is only when they are embodied in the will and passions of men that they become effective. Ruysen believes that it will be an élite which will lead the way.

Individuals who cross frontiers, non-political groups extending beyond national boundaries, and the states themselves are the agents of international life. Particular emphasis is given to the relatively new private international associations which have flourished since the rise of modern means of transport and communication. These organizations, formed by individuals with common interests, have contributed greatly to the building of international solidarity. The function of the state in international relations is to act as an organ for the elaboration of international law. Human society can constitute itself only by the continuous invention and perpetual amendment of international law. Private international organizations and inter-

state organizations constitute on parallel planes a social reality which tends visibly toward universality. From here Ruyssen turns to a functional classification of international activities: the spiritual, the economic, and the political.

After tracing the growth of the international community along religious, intellectual, and economic lines, he comes to the development of international political relations. He finds the purely political association of states to be most important. It is a power relationship. Its force is war. From this springboard Ruyssen sets out to trace the history of war and to give a balance-sheet of its positive and negative contributions. Along with the development of war has grown the organized effort toward peace. He follows this from the time of the Greeks to the first years of the United Nations in a surprisingly full and fresh account.

At the beginning of the twentieth century war and peace were the object of parallel systems of institutions which were in some ways complementary to each other, Ruyssen holds. He maintains that war is a true institution of public law. Although not formally recognized as an institution, its institutional character is affirmed internally by the organization of the state for the waging of war and externally by the system of conventions which in seeking to regulate war give recognition to its legitimacy. On the other hand, organization for peace is similarly institutionalized in the diplomatic and consular services and in a whole system of cultural and economic relations on the international plane.

Ruyssen continues to trace the parallel developments of war and peace in World War I and the League of Nations and in World War II and the United Nations. Regionalism, federalism, and world empire are discussed as possible alternatives to the solution of the problem of world order. In spite of its final disintegration, the League deserves to be considered as the first start toward the general organization of the common interests of humanity. It made some valuable innovations, including the practice of continuity of diplomatic discussions, increased confidence in the usefulness of arbitration and conciliation, publicity in international debates, and the "spirit of Geneva." Geneva became the veritable capital and sanctuary of both official and private internationalism. The League's structural weakness lay in the failure to curb national sovereignty, but the failure of the League was not due to the Covenant but to the lack of wholehearted support of the Member States. The greatest tribute the League ever received was the fact that in the days of its most humiliating decline not a single voice was opposed to the creation of a successor to it.

Ruyssen points out that in the intention of its founders, the League was above all a political organization, an instrument of peace. It was in the course of its gradual evolution that economic, humanitarian, and intellectual activities developed and became important. The lesson was not lost

in the creation of the United Nations, whose Charter strongly emphasizes these economic and social objectives, implementing them by provisions for the Economic and Social Council and the specialized agencies. Ruysen believes that it was a very wise move to assign an ample program of non-political tasks to the United Nations. He feels that it is not impossible that the accessories will end by safeguarding the essentials, and that successful operation on the economic and spiritual level may come to soften the virulence of political antagonisms and render possible a universal federation of states. If this federation could be set up without having to pay the price of a third world war, such a development would be the most decisive revolution of history.

In his final chapter Ruysen turns to the development of an international ethic. In the past, morality has seemed to stop at the frontier. But in the course of history relations have developed which bind together countless individuals beyond the limits of frontiers, thus forming the basis for international morality and international institutions. While it may be premature today to affirm the existence of a common conscience of humanity, it would be more arbitrary still to deny that this conscience is being formed.

AUSTIN VAN DER SLICE

State Insolvency and Foreign Bondholders. Vol. I: *General Principles.*

By Edwin Borchard. pp. xxx, 382. Index; Vol. II: *Case Histories.*

By William H. Wynne. pp. xxv, 652. Index. New Haven: Yale University Press, 1951. \$25.00.

The present work was undertaken by Dr. Borchard more than twenty years ago. In seeking the answers to questions raised by Ambassador Morrow with respect to rights of priority among different classes of foreign creditors of Mexico, he found that the subject of state insolvency as a whole had not been adequately explored by scholars. He obtained a grant from the Carnegie Corporation to finance an investigation which was conducted, under his direction, by Mr. Wynne from 1931 to 1935. Mr. Wynne's studies of the foreign bond defaults and debt readjustments of Mexico, Peru, Santo Domingo, Greece, Portugal, Turkey, Bulgaria, and Egypt have now been brought up to date by him and published, in Volume II of the present work, on the fund established in memory of Ganson Goodyear Depew. "With these case histories as the chief factual source," Dr. Borchard, in Volume I, "discusses topically the main problems and practices which have arisen out of defaults by national governments on their foreign bond issues and examines how far past experience in the regulation of state insolvencies appears to have resulted in the establishment of principles and rules governing the matter." Dr. Borchard had the satisfaction of seeing the printed volumes before his untimely death in July of this year.

Mr. Wynne's record and Dr. Borchard's analysis of "the legal, diplomatic, and economic developments which have characterized the relations of governments with their foreign bond creditors in the past" have "intrinsic historical interest" and will doubtless "prove useful . . . to those who may be concerned . . . with external loans which foreign governments may seek to contract in the future" (Vol. I, p. vi). The detailed record in Volume II is intended primarily for specialists. Readers of the JOURNAL who are not specialists will be interested in the discussions in Volume I of the legal nature of the loan contract and the law to be applied in case of breach (pp. 3-17, 64-72); the purpose, effectiveness, and legal significance of international guaranties (pp. 103-111); the legal and economic remedies of bondholders (pp. 157-178); the organization and functioning of private and quasi-official protective bodies (pp. 179-216); diplomatic protection for bondholders (pp. 217-273); and the various types of financial control of governments in default (pp. 277-299).

The authors have had limited success in their search for principles and rules governing the matter of state insolvency. Their studies have, however, disclosed "patterns of practice" (Professor Corbett's phrase) which are followed with a fair degree of consistency by states and by private and quasi-official bodies in their attempts to induce defaulting governments to accept analogies from the municipal law of bankruptcy as applicable to their transactions with individuals owing allegiance to other governments.

EDGAR TURLINGTON

The British Year Book of International Law, 1949. (Royal Institute of International Affairs.) London: Oxford University Press, 1951. pp. viii, 569. Table of cases. Index. \$8.50.

This twenty-sixth volume of the *British Year Book of International Law* makes interesting and timely contributions of great value to the literature of international law. Evidence of skillful editorial selection and planning appears throughout. In his article on "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," Professor H. Lauterpacht re-examines the utility of so-called "canons of interpretation," in particular the potentially contradictory rules of construction based upon "restrictive interpretation" and "effectiveness." J. Mervyn Jones, writing on "Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies," provides an illuminative analysis of "a field in which international practice may well in certain respects be rather ahead of doctrine and arbitral jurisprudence." In "Aspects of State Sovereignty" Sir Arnold McNair reprints a selection of Reports to the British Crown by its Law Officers with particular reference to state continuity and the status of heads of state. "Money in Public International Law" is the subject of a valuable article by Dr. F. A. Mann. "The Geneva Conventions of 1949" are

analyzed by Miss Joyce Gutteridge, and "The Right of Asylum" by Miss Felice Morgenstern. New light is thrown on "Foreign Armed Forces: Immunity from Supervisory Jurisdiction" by G. P. Barton and on "Treaty Relations of British Overseas Territories" by J. E. S. Fawcett. "The Treaty-Making Power of the United Nations" is carefully analyzed by Clive Parry; and S. Rosenne contributes an interesting note on "Recognition of States by the United Nations." Aspects of private international law are dealt with in a number of articles, and case summaries and problems of international organization also receive attention.

With its illuminating reappraisals of practice and doctrine and its furrowing of new ground, the *British Year Book* reveals a lively sense of responsibility for contributing to the progressive development of international law.

HERBERT W. BRIGGS

Inter-American Juridical Yearbook, 1949. Washington: Pan American Union, 1950. pp. lx, 390. Index. \$3.00.

The second *Inter-American Juridical Yearbook* follows the pattern of the first: It "seeks to present a survey of the development of inter-American regional law during the current year." The editor, our esteemed colleague, Charles Fenwick, Director of the Department of International Law and Organization of the Pan American Union, finds it a problem to determine the line between general international law and inter-American regional law, but concludes that "There are special problems of international law affecting the relations of the American States." It may be suggested that one such boundary problem is that of the law of asylum, but it is interesting to note that Colombia and Peru nevertheless took their case to the International Court of Justice.

The volume is divided into six parts, the first consisting of brief studies in international law and organization by Accioly (Non-Intervention), Podestá Costa (Convention on Rights and Duties of States), Fenwick (Competence of the Council of the O. A. S.), Ulloa (Asylum), and Garcia Amador (Recognition of *de facto* Governments). Part II consists of notes by individuals on current developments, such as the Inter-American Committee on Peace, Comparison of Legal Education in Latin America and the United States, and Synopsis of Conferences held during 1949. Part III is headed "Activities of the United Nations bearing upon the Development of Inter-American Law and Organization," which contains only an article by Dr. Liang on the International Law Commission. Part IV is a collection of reviews of articles published in American international law journals, and Part V, a collection of book reviews. These two parts constitute a useful summary of literature for the harassed student. Finally, Part VI contains documentary materials.

This Yearbook is not only informative, but more interesting than most such publications.

CLYDE EAGLETON

Bibliographie des Écrits imprimés de Hugo Grotius. By Jacob ter Meulen and P. J. J. Diermanse. The Hague: Martinus Nijhoff, 1950. pp. xxiv, 708.

"*Inter arma non silet scientia.*" Under the German occupation and the often bloody resistance it occasioned, the well-known Director of the Carnegie Library in the Peace Palace, Doctor Jacob ter Meulen, and Doctor Diermanse of his staff undertook the tremendous task of collating the whole of Grotius' printed work, as well as all its editions and translations. The result is an exemplary bibliography with exhaustive notes on every publication. Till now scholars had to work with Rogge's *Bibliotheca Grotiana* of 1883. It only contained the printed *Grotiana* which Rogge had seen himself and numbered 462 items; whereas the new one with the Addenda amounts to 1323. Grotius' book that has had the greatest number of readers, *The Proof of the True Religion* (1622), and its Latin version of 1627, *De veritate religionis christianae*, cover 157 of these items; *De Jure belli ac pacis*, 114. An astonishingly large number of items—404—are devoted to Grotius' poetical works. By the fact that nearly all of Grotius' poetry is written in difficult Latin, this part of his *oeuvre* is rather unknown to the present generation. It is a pity that its beauty therefore rests in concealment, and this all the more as it is of the greatest importance to a just appreciation of the poet himself and of his time, as the late editor of Grotius' correspondence, Doctor Molhuysen, never failed to emphasize. We therefore read with great satisfaction (p. 5) that a new edition of Grotius' poetical work with translations is being prepared by Professor Kuiper of the Free University in Amsterdam and Doctor Hoek. One may hope that the necessary funds for this huge enterprise will be found.

It is not always easy to bring under separate headings all of Grotius' writings. The philologist, the historian, the theologian, the poet, and the jurist are indeed very much intermingled in his writings. Because to Grotius religion and law for instance are equally self-evident, equally "natural," some of his theological books are at the same time legal, and the reverse is also true. The learned authors have tried to cope with the aforesaid difficulty by referring at the beginning of a new part of the Bibliography to publications mentioned in other parts treating analogous subjects. In some instances this very judicious method could perhaps have been practiced a little more. On page 309 we missed the interesting historical Chapter XI of *De Jure Praedae*, as well as the nearly 600 diplomatic notes to the Swedish Chancellor Oxenstierna, that most valuable commanding view on world history in the years 1635-1645, when already "a long chain linked

together European affairs with those of America and the Indies," as Grotius once wrote.

Nobody who is interested in Grotius' life and work will henceforth miss the opportunity of consulting ter Meulen and Diermanse's really classic Bibliography. Its two authors by their laborious and excellent work have rendered a great service to science. It will be appreciated abroad that they couched their work in the French language so that it may be understood all over the world.

VAN EYSINGA

UNRRA: The History of the United Nations Relief and Rehabilitation Administration. 3 vols. By George Woodbridge and others. New York: Columbia University Press, 1950. pp. xxxvi, 518; xii, 602, Index; xiv, 520, Appendices, Index. \$15.00.

This is a remarkable work from many points of view. Few, if any, international organizations provided for an official history of their work. In the case of UNRRA this foresight is not merely commendable; it was essential considering the controversy which accompanied its activities. The work, as far as the reviewer, whose contacts with UNRRA were slight, can judge, is competently and candidly done. It provides excellent materials for case studies in various aspects of international organization. Of the three volumes, two are devoted to presentation, commentary, and analysis; the third volume contains the essential documents. Throughout the volumes there are many maps, charts, and graphs; the index is useful, though it might have been made even more complete than it is. The first two parts discuss the structure of one of the few international organizations with major operating functions from its inception in 1943 to its end in September, 1948. Ample information is provided concerning the liquidation of the organization and the transfer of some of its functions to other agencies. Parts III-VII review the major operational functions: supply operations, field operations in general, in Europe, and the Far East, and displaced persons operations. Part VIII is an appraisal of the organization.

It is obvious that an organization which, within the space of a few years, spent nearly four billion dollars and employed close to 25,000 persons, could not hope to escape criticism. The authors make no attempt to gloss over such shortcomings as appear to an unbiased observer and student. Internal administrative difficulties, including the unsatisfactory financial control, are discussed, as well as shortcomings in field missions and operations. On the other hand, the governments which established the organization and kept the financial and supply strings do not escape some criticism. Many of the difficulties might have been avoided had better care been bestowed on the drafting of principles and purposes of the organization, by putting it on a sound budgetary basis, by seconding needed personnel, and

by establishing clear priorities at a time when supplies and shipping were difficult to obtain.

The authors score a point when they argue, as they appear to do, that the decision to terminate UNRRA was not based on its shortcomings but on other considerations. The authors avoid any blanket judgment on the achievements and failures of UNRRA, which in their view cannot be measured accurately even now. Rather they look upon UNRRA from four points of view: the work, the international organization, the administration and the concept. In its work aspect, that is, in its task of getting supplies from countries that could spare them and making them available to those that were in need, UNRRA did not fail, even though the exact degree of success achieved may be difficult to measure (Vol. II, p. 539). As an international organization UNRRA was a success in terms of the functions performed by its organs (the Council and its Committees). It is the view of the authors that

what they were supposed to do—determine broad basic policies within which the Administration should function, and advise the Administration—they did with a minimum of friction and misspent time and a maximum of sense. . . . When the member governments were no longer in basic agreement regarding the ultimate ends, they did not sully the record of UNRRA by using it as a battleground; they dissolved it (Vol. II, p. 541).

The Administration did not fail, although it suffered from many shortcomings. It provided assistance to a great number of people in times of greatest need. The authors argue in this connection that the different nationalities of the employees

were no handicap or hindrance to the work in spite of the great stresses and strains of the time. International organizations may for quite other reasons be unsuited to perform certain tasks, but never again can it be said with justice that an international organization, because of the necessarily diverse national backgrounds of its personnel, cannot perform operating tasks. . . . To some, with an eye to the future, this demonstration was one of the most important accomplishments of the Administration, one important respect in which it did not fail (Vol. II, p. 549).

What then of UNRRA as the concept which was one of sharing on the basis of needs and without discrimination? Here again the conclusion of the authors is that it did not fail, but that its supporting idea, namely, willingness to co-operate among the membership, began to diminish in 1946 and finally completely disappeared in the growing ideological and political conflict.

There will be some, it is safe to assume, who will not wish to agree with the conclusions of the authors. Their thesis, however, is supported by ample documentary evidence. Those who disagree have now at least the opportunity to fortify their viewpoint with the materials put at their dis-

posal in this work. To the authors students of international relations will be grateful for a fair and thorough analysis of a great experiment.

LEO GROSS

International Non-Governmental Organizations: Their Purposes, Methods and Accomplishments. By Lyman Cromwell White. New Brunswick: Rutgers University Press, 1951. pp. xii, 326. Appendix. Index. \$5.00.

Mr. White's first book, *The Structure of Private International Organizations* (1933), grew out of his work at the Graduate School of International Studies at Geneva twenty years ago. He has visited the headquarters of about 250 "INGO's" and has accumulated a vast amount of factual material about them. Since ECOSOC implemented Article 71 of the Charter of the United Nations in 1946, he has served in the section of the Secretariat concerned with relations with INGO's. He should therefore be especially equipped to appraise their rôle in the United Nations age.

Mr. White points out that the study of political science has moved from the analysis of formal organization and structure of government to recognition of the importance of "informal government" in the political party and the pressure group. He believes that the study of international relations has not made a parallel advance and has failed adequately to appreciate the rôle of informal associations and their impact upon intergovernmental organizations.

Although Mr. White disavows any purpose to provide a systematic handbook (like the *Directory of the Union of International Associations*), the main part of his book is descriptive of the work of specific organizations, classified by twelve major fields of interest, such as Business and Finance (under which appear international cartels as a type of international non-governmental organization), Labor, Education, Social Welfare (including the Jewish Agency for Palestine)—even Sports. Not more than a page or two can be devoted to any one organization; the statements of purpose are usually quotations from publications of the INGO, some dating from 1915.

The greatest limitation upon the usefulness of Mr. White's book is that he has cut off the account at 1939, because he feels that it is too early to tell the story of INGO's in the United Nations age. Nevertheless he has had to note open and notorious changes in name or purpose since the war (as in the international organizations of trade unions) so that his narrative alternates between "was" and "is." While mostly descriptive, the volume is thus not quite a current directory, not quite a history. Starting from his sound thesis that international non-governmental organizations have a vital rôle to play in international relations, perhaps in a future volume Mr. White will analyze more critically their potentialities and limitations in the United Nations age.

CHARLES S. ASCHER

Political Realism and Political Idealism. By John H. Herz. Chicago: University of Chicago Press, 1951. pp. xii, 276. \$3.75.

The problem to which the author addresses himself in this work is among the most familiar with which political scientists have to deal, namely, the conflict between selfish power politics and generous utopianism, both within the nation and in international relations. Therefore the great merit of the book must be sought in any new or particularly valuable contribution to the solution of that problem which it has to offer.

It appears to the present reviewer that Professor Herz has, indeed, made such a contribution in his doctrine of "realist liberalism," although a certain amount of prejudice goes into this judgment, as the reviewer has himself tried for some years to work out such a doctrine in his own thought.¹ Professor Herz has in mind a combination of a reasonable degree of selfish realism and a reasonable degree of social idealism; for fuller and more precise and authentic indication of Professor Herz's thought the reader is referred to the text. It is just possible that this little volume might become extremely important in the history of political philosophy and practice.

As already indicated, the author regards the international sphere as providing a particularly apt illustration of his problem and as calling particularly loudly for a sane solution thereof. International power politics are particularly vicious, international utopianism particularly vapid. This reviewer agrees completely with that analysis, but is astounded that the author has not given any attention to the one branch of international relations and organization where exactly the kind of realistic common action desired is the standard, namely, international administration (international health work, for example). Such a glaring omission amply confirms the observation that international administration, not being as sensational as war, on one side, or peace, on the other, really interests few observers and enjoys only a general neglect in spite of its inherent and strategic value to mankind.

PITMAN B. POTTER

NOTES

Manuel de Droit International Public. (2d ed.) By L. Delbez. Paris: Librairie Générale de Droit et de Jurisprudence, 1951. pp. 442. In his introduction, Professor Delbez of the University of Montpellier describes this volume as an elementary text, limited to fundamentals, and based on a theoretical position described as *l'objectionisme néo-classique*. It is divided into three parts: *Le Droit de la Paix*, over half the book; *Le Droit Préventif de la Guerre*, including *La Sécurité Internationale* and *La Solution Pacifique des Conflits*; and *Le Droit de la Guerre*. It is a compact little book (nearly a fourth of it is documents), in which the law stated is

¹ See also, below, p. 818, reference to article by Morgenthau in Year Book of World Affairs, 1951.

conservatively that of the standard texts of the past, but which emphasizes heavily the developing community of nations and its institutions.

CLYDE EAGLETON

The Origins of Muhammadan Jurisprudence. By Joseph Schacht. Oxford: Clarendon Press, 1950. pp. xii, 348. Index. \$5.00. The evolution of Islam's jurisprudence from the moral maxims of the Quran and the experiences of Arabic life, without benefit of legislative formulation, is comparable to the emergence of international law from the natural law of the Christian ethic and the practices of European monarchies. Grotius almost created international law with a book in 1625. The classical theory of Muhammadan law was created by Shafi'i, whose activity extended roughly from A.H. 179 to 204 (A.D. 796-820), the period of Harun al-Rashid. Grotius analyzed centuries of precedent. Shafi'i worked with far different material, and this book is a study of his accomplishment.

In about a century after the *Hijra*, in A.D. 622 the Saracenic Empire was well established under the Abbassid caliphs on three continents over a great variety of peoples inhabiting an area covering 85 degrees of longitude and 25 of latitude. The Quranic rules and Arabic tribal laws had been adapted to new conditions and cultures in this vast area without any form of enactment. The Companions and Successors of the Prophet throughout *Umayyad* times had multiplied the "living tradition" accepted by the schools of law. After a century and a half there was a self-contradictory mass of teaching and writing, and differences of doctrine between the schools of Medina, Syria, and Iraq.

Shafi'i, who taught at Medina, Baghdad, and Cairo, at that juncture put forth the classical theory of Muhammadan law. That theory is based on four sources: the Quran, the *sunna* of the Prophet, the consensus of the orthodox community, and the method of analogy. Schacht analyzes the evolution of the jurisprudence by an intensive use of Shafi'i's writings in comparison with those of earlier scholars. The four parts of the book thus examine the development of legal theory, the growth of legal traditions, the transmission of legal doctrine, and the development of technical legal thought, the last two parts reviewing the work of the principal writers.

The Quran as a source of Islamic law was taken for granted by all the schools of law, but Shafi'i gave the *sunna* importance as the model behavior of the Prophet, in contrast with the earlier interpretation of it as an ideal not necessarily connected with the Prophet. The statement identifying the *sunna* was preceded by a chain of transmitters (*isnad*) intended to guarantee its authenticity. The collections made in the third century after the *Hijra* concentrated on the traditions transmitted by the Prophet to the neglect of those coming from the Caliphs and others. They reduced greatly the self-contradictory mass and reflected the success of Shafi'i's insistence that only traditions going back to the Prophet carry authority. Especial reliance was placed on the *isnad*, the chain of transmitters of the tradition from the Prophet. Shafi'i's insistence upon establishing the *isnad* of a *sunna* or tradition from the Prophet, and upon their improvement, fixed standards which invested the collections of traditions in the third century A.H. with the particular authority of the classical *corpus* of orthodox Muhammadan tradition.

In finding the *sunna* and identifying the consensus the Islamic jurisprudence relied on practice and tradition, which are spelled out by the aid of

opinion in general (*ra'y*), individual reasoning (*ijtihad*), personal preference (*istihsan*) and the parallels of analogy (*qiyas*). The claim is made for Shafi'i that he applies these methods to the traditions and rules of Islam with a consistency and cogency that produce a jurisprudence.

Islamic law determined the attitude of the Muslim toward the non-Muslim. It bound the Faithful in communities ranging from the primitive nomad to the fabulous civilization of Baghdad, and wherever they might reside. Within Islam non-Muslim communities were tolerated, with religious freedom and their own common laws, but subject to civil disabilities such as payment of tribute and exclusion from military service. Muhammadan jurisprudence began with no more attention to international relations or law than, say, contemporary Anglo-Saxon law. Long after Shafi'i's day Islam developed its own theory in this field as part of the *Shari'a*, the canon law.¹

It was not until 1856 that the Powers which had engaged in the Crimean War deigned, in the Treaty of Paris, to admit the Ottoman Porte to the "public law of Europe." The Sultan of Turkey, who was Caliph of Sunnite Islam, was carefully dissociated from his foreign office in that concession. Not until the 1920's were the Muslim countries taken into the international community on a par with the Christian peoples, minus extra-territoriality. And it was only in 1946 that the World Court included a Muslim judge.

DENYS P. MYERS

Commercial Treaties and Agreements: Principles and Practice. By Harry C. Hawkins. New York: Rinehart & Co., 1951. pp. viii, 254. Index. \$3.50. This small volume supplies the need for an up-to-date, authoritative treatment in one volume of commercial treaties and agreements. The author, who, as a government officer (before he became Professor of International Economic Relations at the Fletcher School of Law and Diplomacy) had long experience in international negotiation in the commercial field, reflects in the book this rich background of practical work. He explains in the preface, however, that a substantial part of what is presented is based upon studies made by named students at the Fletcher School.

The approach is essentially that of an economist—one who is a strong believer in multilateralism in world trade, in the general objectives of the projected ITO Charter and the GATT, and in greater freedom through the removal of trade barriers of various kinds. "Commercial," as distinct from "establishment" and "navigation," provisions receive strong relative emphasis. A special merit of the volume is its inclusion of specific, understandable illustrations of trade situations and problems. Particularly effective are treatments of such matters as dumping and quantitative restrictions. Throughout the work attention is frequently directed to the policy of the United States in relation to world trade.

The author's self-imposed limitations in the planning of the volume doubtless account for the fact that only one chapter (of twenty pages) has been given to "establishment matters." This deals with taxation and investment (including the subject of protection against uncompensated expropriation), but does not go into many matters that have had place in recent commercial treaties of the United States, such as access to courts, in-

¹ See Majid Khadduri, *Law of War and Peace in Islam*.

heritance of property, freedom of worship, social insurance, freedom of reporting, mining, and industrial property rights. The section on "kinds of commitments" accorded in treaties and agreements (pp. 11-13) offers a broad classification into "relative" and "absolute," but does not refer specifically in this connection to the international law standard or to that of "equitable" treatment (although the latter is the subject of some later discussion, as at pp. 162, 165, 170).

While it would appear that nearly any of the topics treated could be appropriately made the subject of a monograph instead of a chapter or section, the material in the concise form in which it is here presented seems to the reviewer to have very real value for the student as well as for the government officer needing to have in condensed form a discussion of the principles involved in international trade, of the trading problems which commercial treaties and agreements attempt to meet, and of the devices employed to this end.

The United States and the Restoration of World Trade. By William Adams Brown, Jr. Washington, D. C.: The Brookings Institution, 1950. pp. xiv, 572. Appendix. Index. \$5.00. This balanced and scholarly analysis and appraisal of the ITO Charter and the General Agreement on Tariffs and Trade (GATT) supplies in useful form much factual material and interpretation that should be of value to students of international relations in general and particularly to specialists on economic foreign policy. Since the book was written, the ITO Charter has, at least for the time being, been placed on the shelf, and it may never come before Congress for approval. Even if it does not, however, the effort in connection with its projection is instructive as to the problems, forces, and formulas obtaining in a sphere in which international co-operation continues to be urgently needed. In the case of the GATT, which is in force, its implications and utility, and the significance of the forum which it provides, have begun to be better understood with the developing experience in its actual application.

After providing a summary background statement of international effort since 1919 to construct a world trading system, the author essays skillfully the task of explaining the debates which resulted in the ITO Charter. He has in this connection given considerable attention to the points of view of individual countries or groups of countries. He has considered the manner in which the plan as finally worked out fits into a broad pattern of inter-organizational co-operation, and has shown especially the relationship of the Charter-GATT effort to that for the restoration of Europe, suggesting that without the ERP there might have been no Charter, or a very different one, and that without United States championship of the principles incorporated in the Charter, the principles and objectives of the ERP might not have been the same (pp. 306, 310).

While strong relative emphasis is placed on the principles of multilateralism in trade and on such matters as the most-favored-nation principle, preferences, quantitative restrictions, state trading, cartels, commodity agreements, foreign investments, and restrictive business practices, such a question as that of the settlement of disputes comes in for some attention. On this the author notes the split between the civil law countries, which favored reference of disputes to the International Court of Justice, and the Anglo-Saxon common law countries, which preferred restrictions upon such reference, the result being the Charter provision for the use of advisory opinions—although not even the use of this device is specifically provided

for in the GATT (pp. 140, 254). There is emphasis throughout upon the important rôle assigned to consultation, investigation, and co-operation.

With reference to exceptions permitted in the Charter, the author notes the balance sought to be achieved between "short-run possibilities" and "long-run expectations" (p. 160). He views as the fundamental conception on which the Charter is constructed "that a way must be found for countries differently organized to live and trade together and to compete on equitable terms without being required to abandon their own forms of economic organization" (p. 371). He feels that "if the world is confronted with an imminent threat of war or if war breaks out," the chances of the ITO will be non-existent (p. 352).

A special feature of the book, designed to facilitate study of the Charter by those who have not only a general, but also a technical and professional interest in it, is an appended 166-page analysis, each topical heading of which has been broken down into ten elements or divisions so as to permit "reading down" under each topic or "reading across," that is, following each of the divisions through the whole succession of topics.

This volume adds another to the set of extremely useful reference materials which the International Studies Group of the Brookings Institution has made available.

ROBERT R. WILSON

The Year Book of World Affairs, 1951. (London Institute of World Affairs.) London: Stevens & Sons, 1951. pp. x, 428. Index. 30 s. The 1951 *Year Book* contains thirteen articles and over a hundred pages of reviews of books and articles. This reviewer, as he has said before, regards this survey of the literature of the field as the most helpful part of the volume. That the reviews are constructively critical adds to their value and opens to the reader new avenues for study.

The articles, as usual, cover a wide geographic and institutional range. Sir Alexander Cadogan draws up, though somewhat sketchily, a balance sheet for the United Nations. Hans Morgenthau discusses in an historical vein the "Moral Dilemma in Foreign Policy," and concludes that the choice is "between one set of moral principles divorced from political reality and another set of moral principles derived from political reality (national interest)." Human Rights and World Politics are considered by Andrew Martin. A very interesting discussion of American statesmen—and American political ways—is contributed by M. J. Bonn. There are articles on the Schuman Plan (Susan Strange); Criminal Justice in Germany Today (F. Honig); Patterns of Relief Work in Germany (Magda Keller); Turkey's Position in the Post-War World (J. Daniel); Trusteeship: Theory and Practice (D. H. N. Johnson); Administration in the American Dependencies (J. R. Friedman, who thinks there is too much Congressional control over colonies); The Havana Charter (J. E. S. Fawcett); The Protection of Civilians in Occupied Territory (J. A. C. Guttridge); and The Papacy and World Peace (B. Tunstall). It is a very useful volume.

CLYDE EAGLETON

British Nationality. Including Citizenship of the United Kingdom and Colonies and the Status of Aliens. By Clive Parry. London: Stevens & Sons, 1951. pp. xix, 216. Appendices. Index. 30 s. This book by Clive Parry of the University of Cambridge takes the place of the chapter on

Nationality which was found in the earlier editions of Dicey's *Conflict of Laws*, but was omitted by the editors of the sixth edition (1949).

Using Dicey's method of rule, comment, and illustration, the author deals in his treatise with British nationality (a) before and (b) since the passage of the momentous British Nationality Act, 1948. That Act created for the first time a separate citizenship of the United Kingdom and colonies, and, by abolishing the fiction of the single British State, British nationality became, by and large, but a status possessed by citizens of any one of the Commonwealth countries, or by citizens of the Irish Republic or by British protected persons.

The new United Kingdom law of citizenship differs in some fundamental principles from that of the United States, despite the common-law ancestry of both. United Kingdom citizenship cannot be transmitted through the mother; a woman married to a United Kingdom citizen acquires United Kingdom citizenship by registration and taking the oath of allegiance; minors may acquire United Kingdom citizenship through adoption by a United Kingdom citizen, or, at the discretion of the Secretary of State, simply by registration; the Secretary of State retains an absolute and unfettered discretion as to whether he will grant a certificate of naturalization, though all the legal prerequisites of naturalization have been fulfilled by an applicant; naturalized United Kingdom citizens can be deprived of their citizenship because of acts following the acquisition of the same, such as disloyalty or disaffection towards His Majesty.

By comparing the texts of the British Nationality Act, 1948, and the Ireland Act, 1949, reprinted in the appendices, with the author's rules and comments, any reader easily will be convinced that this book is a splendid piece of legal exegesis and an indispensable guide in matters of British nationality and United Kingdom citizenship.

GEORGE V. WOLFE

The True Believer. Thoughts on the Nature of Mass Movements. By Eric Hoffer. New York: Harper and Bros., 1951. pp. xiv, 176. \$2.50.

The Operational Code of the Politburo. By Nathan Leites. New York: McGraw-Hill Book Co., 1951. pp. xvi, 100. Index. \$3.00.

The dynamics of group activity and the techniques of those attempting to guide and exploit that activity are of extreme importance to students of international relations and international law. The author of *The True Believer* explores the psychology of those who are to be led or dominated in national and international mass movements; Mr. Leites explores the technique of the exploiter of mass psychology. He also explores the tactics of the *Politburo* of the U.S.S.R. in dealing with other countries. Mr. Hoffer allows himself great latitude in reflecting upon his material and expressing his own opinions; Mr. Leites appears to err seriously in the opposite direction, presenting a large collection of nuggets of raw material (quotations from Communist sources) with very little interpretation or appraisal. Perhaps he was restrained in this matter by his sponsors—the volume is a product of the Rand Corporation—but some discussion of the materials reproduced would surely have been helpful.

In any case both monographs are musts for students of contemporary international relations and almost certainly tell more about today's world of nations than would protracted study of geography, economics, or, it must be admitted, international law.

PITMAN B. POTTER

Every Inch a King. By Sérgio Corrêa da Costa. New York: Macmillan Co., 1950. pp. 230. Index. \$3.00. Whether the author is able to make good the title of his volume, there is no doubt that his biography of Dom Pedro I, First Emperor of Brazil, is delightfully presented, and is as instructive as it is entertaining. Doubtless it is difficult for Brazilians themselves to realize how fortunate they were in being able to attain their independence without the long years of struggle that were necessary to win the independence of the United States and that of most of the Spanish-American states. Here was a dashing young prince, left behind in Brazil when his royal father returned to Portugal, confronted with the choice of himself returning to Portugal or of declaring the independence of his country and creating a new empire in the western world. The choice was not a difficult one, and not as dangerous as the "Cry of Ypiranga"—independence or death—would seem to suggest. The problem before Dom Pedro was rather to consolidate his vast empire and bring order out of chaos. This, indeed, was an arduous task, and the new emperor set about it with intelligence and courage that made him for the time the hero of his people.

The biography thus tells the story of the foundations of the independent state of Brazil. It describes the conflict of factions and parties in Brazil itself and it gives a most interesting picture of the revolutionary movement in both Spain and Portugal that followed the downfall of Napoleon. Throughout it all the personal life of the Emperor is woven in threads of many colors, his love affairs, his political idealism and his practical realism, his liberalism in the establishment of the constitution and his reactionary conservatism in the application of it, and his paradoxical love of liberty and willingness to resort to violence in upholding it. Whether the sum total makes him "Every Inch a King" will be qualified in greater or less degree by the individual reader.

That such a gallant ruler should, in the end, have been forced to abdicate his throne and return to Portugal forms one of the most interesting episodes in the history of constitutional government. The Spanish liberals would have had him accept the triple crown of Brazil, Spain, and Portugal; but he was not liberal enough for the revolutionary faction in Brazil and he was too liberal for the Portuguese conservatives and their supporters in Europe, by whom constitutionalism was feared almost as much as revolution itself.

The translation by Samuel Putnam of the original Portuguese is so admirably done that the story loses nothing of its dramatic character. So cleverly has the author combined historical narrative with incidents describing the personal character of the Emperor that the story reads at times more like an historical novel than a biography. The volume deserves a high place in Latin-American literature, which happily is now being made available to the North American public.

C. G. FENWICK

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[Abbreviations: *ASIL*, American Society of International Law; *BN*, Book Note; *BR*, Book Review; *CN*, Current Note; *Ed*, Editorial Comment; *JD*, Judicial Decision; *LA*, Leading Article; *LN*, Notes on Legal Questions concerning the United Nations]

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MUTUAL DEFENSE ASSISTANCE

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE GOVERNMENT OF THE REPUBLIC OF KOREA

*Signed at Seoul, January 26, 1950; in force same date **

PREAMBLE

The Governments of the United States and of the Republic of Korea:

Desiring to foster international peace and security, within the framework of the Charter of the United Nations,¹ through measures which will further the ability of nations dedicated to the purposes and principles of the Charter to develop effective measures for self-defense in support of those purposes and principles; and without prejudice to continue exertion of maximum efforts to obtain agreements to provide the United Nations with armed forces as provided by its Charter, and to obtain agreement among member nations upon universal regulation and reduction of armaments under adequate and dependable guarantee against violation;

Recognizing that measures to eliminate insecurity caused by fear of aggression will enhance the progress of economic development;

Considering that, in furtherance of these principles, the Government of the United States has enacted the Mutual Defense Assistance Act of 1949² providing for the furnishing of military assistance by the United States of America to the Republic of Korea; and

Desiring to set forth the understandings which govern the furnishing of assistance by the Government of the United States under the Mutual Defense Assistance Act of 1949, and the receipt of such assistance by the Republic of Korea;

Have agreed as follows:

ARTICLE I

1. Each Government, consistently with the principle that economic recovery is essential to international peace and security and must be given clear priority, will make or continue to make available to the other, and to other Governments, such equipment, materials, services, or other military assistance as the Government furnishing such assistance may authorize and in accordance with such terms and conditions as it may agree. The furnish-

* Department of State, *Treaties and Other International Acts Series*, No. 2019 (Publication 3796).

¹ Treaty Series 993; 59 Stat. 1031; this JOURNAL, Supp., Vol. 39 (1945), p. 190.

² Public Law 329, 81st Cong.; 63 Stat. 714; this JOURNAL, Supp., Vol. 44 (1950), p. 29.

ing of any such assistance as may be authorized by either party hereto shall be consistent with the Charter of the United Nations. Such assistance as may be made available by the United States of America pursuant to this Agreement will be furnished under the provisions, and subject to all of the terms, conditions and termination provisions, of the Mutual Defense Assistance Act of 1949, and such other applicable United States laws as may hereafter come into effect. The two Governments will, from time to time, negotiate detailed arrangements necessary to carry out the provisions of this paragraph.

2. The Government of the Republic of Korea undertakes to make effective use of assistance received pursuant to paragraph 1 of this Article for the purposes for which such assistance was furnished, and that Government will not, without the prior consent of the Government of the United States, devote assistance so furnished to purposes other than those for which it was furnished.

3. The Government of the Republic of Korea undertakes not to transfer to any person not an officer or agent of such Government, or to any other nation, title to or possession of any equipment, materials, or services, pursuant to paragraph 1, without the prior consent of the Government of the United States.

ARTICLE II

In the event that Article VIII of the Economic Cooperation Agreement between the Government of the Republic of Korea and the Government of the United States, signed on December 10, 1943² at Seoul, Korea, shall cease to be in force prior to the termination of this Agreement, the Government of the Republic of Korea will, for so long as this Agreement remains in force, facilitate the production and transfer to the Government of the United States, for such period of time, in such quantities and upon such terms and conditions as may be agreed upon, of raw and semi-processed materials required by the United States of America as a result of deficiencies or potential deficiencies in its own resources, and which may be available in Korea. Arrangements for such transfers shall give due regard to reasonable requirements for domestic use and commercial export of Korea.

ARTICLE III

1. Each Government will take appropriate measures consistent with security to keep the public informed of operations under this Agreement.

2. Each Government will take such security measures as may be agreed between the two Governments in order to prevent the disclosure or compromise of classified military articles, services or information furnished by the other Government pursuant to this Agreement.

² Treaties and Other International Acts Series, No. 1908.

ARTICLE IV

The two Governments will, upon request of either of them, negotiate appropriate arrangements between them respecting responsibility for patent or similar claims based on the use of devices, processes, technological information or other forms of property protected by law in connection with equipment, materials or services furnished pursuant to this Agreement. In such negotiations, consideration shall be given to including an undertaking whereby each Government will assume the responsibility for all such claims of its nationals and such claims arising in its jurisdiction of nationals of any country not a party to this Agreement.

ARTICLE V

The Government of the Republic of Korea will, except as otherwise agreed to, grant duty-free treatment and exemption from internal taxation upon importation or exportation of products, property, materials or equipment imported into its territory in connection with this Agreement.

ARTICLE VI

1. The two Governments will, upon the request of either of them, consult regarding any matter relating to the application of this Agreement or to operations or arrangements carried out pursuant to this Agreement.

2. The Government of the Republic of Korea will accord, to duly authorized United States representatives, facilities freely and fully to observe the utilization of assistance furnished pursuant to this Agreement.

ARTICLE VII

The two Governments recognize their mutual interest, consistent with mutual security and recovery objectives, in effective controls over the export of war-potential materials, equipment, and, in so far as practicable, technical data; and the two Governments will consult with a view to taking measures for the accomplishment of these ends.

ARTICLE VIII

1. This Agreement shall enter into force upon signature and will continue in force until three months after the receipt by either party of written notice of the intention of the other party to terminate it. This Agreement shall be submitted to the Korean National Assembly for ratification.

2. This Agreement shall be registered with the Secretary General of the United Nations in compliance with the provisions of Article 102 of the Charter of the United Nations.

Done in duplicate, in the English and Korean languages,⁴ at Seoul, Korea, on this 26th day of January 1950. The English and Korean texts shall have equal force, but in case of divergence, the English text shall prevail.

IN WITNESS WHEREOF, the respective representatives, duly authorized for the purpose, have signed the present Agreement.

FOR THE GOVERNMENT OF THE
UNITED STATES:

BY JOHN J. MUCCIO

FOR THE GOVERNMENT OF THE
REPUBLIC OF KOREA:

(signed) BY S. M. SIHN

(signed) BY D. Y. KIM

[SEAL]

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND IRAN

*Exchange of notes signed at Washington, May 23, 1950;
in force same date **

*The Acting Secretary of State to the Iranian Chargé d'Affaires ad
interim*

DEPARTMENT OF STATE

WASHINGTON

May 23, 1950

SIR:

I refer to the conversations which have recently taken place between the representatives of our two Governments concerning the transfer of military assistance by the Government of the United States of America to the Government of Iran pursuant to Public Law 329, Eighty-first Congress¹ of the United States of America, and to confirm the understandings reached as a result of those conversations as follows:

1. The Government of the United States of America, recognizing this principle that economic recovery is essential to international peace and security and must be given clear priority, undertakes to make or continue to make available to the Government of Iran on a grant basis such equipment, materials and services as the Government of the United States of America may authorize. The furnishing of any such assistance as may be authorized pursuant hereto shall be consistent with the Charter of the

⁴ Korean text not printed here.

* Department of State, Treaties and Other International Acts Series, No. 2071 (Publication 3793).

¹ 63 Stat. 714; this JOURNAL, Supp., Vol. 44 (1950), p. 29.

United Nations² and shall be subject to all of the applicable terms and conditions and termination provisions of the Mutual Defense Assistance Act of 1949³ and such other applicable laws of the United States of America relating to the transfer of military assistance. The two governments will, from time to time, negotiate detailed arrangements necessary to carry out the provisions of this paragraph.

2. The Government of Iran undertakes to make effective use of assistance received pursuant to paragraph 1 for the purposes for which such assistance was furnished and will not devote such assistance to purposes other than those for which it was furnished in accordance with these understandings.

3. In the common security interest of both governments, the Government of Iran undertakes not to transfer to any person not an officer or agent of such government or to any other nation title to or possession of any equipment, materials or services received on a grant basis pursuant to paragraph 1, without the prior consent of the Government of the United States of America.

4. The Government of Iran, after giving due consideration to reasonable requirements for domestic use and commercial export of Iran, which are to be determined by the Iranian Government itself, agrees to facilitate the production, transport, export and transfer to the Government of the United States of America, for such period of time, in such quantities and upon such terms and conditions as to the value, method of payment, et cetera, as may be agreed upon, of raw and semi-processed materials required by the United States of America as a result of deficiencies or potential deficiencies in its own resources, and which may be available in Iran.

5. (A) The Government of Iran will take appropriate measures which are not inconsistent with security and the interests of the country to keep the public informed of operations pursuant to these understandings.

(B) Each government will take such security measures as may be agreed in each case between the two governments in order to prevent the disclosure or compromise of materials, services or information furnished by the other government pursuant to these understandings.

6. The Government of Iran, except as may otherwise be agreed between the two governments, shall grant duty-free treatment and exemption from internal taxation on importation or exportation to products, property, materials or equipment imported into its territory in connection with this understanding.

7. The Government of Iran agrees to receive technical personnel of the Government of the United States of America who will discharge in its territory the responsibilities of the Government of the United States of America for implementing the provisions of these understandings and to

² Treaty Series 993; 59 Stat. 1031; this JOURNAL, Supp., Vol. 39 (1945), p. 190.

³ *Supra*, note 1.

accord them necessary facilities to observe the progress of assistance furnished pursuant thereto.

8. The two governments will, upon request to either of them, negotiate appropriate arrangements between them respecting responsibility for patent or similar claims based on the use of devices, processes, technological information or other forms of property protected by law in connection with equipment, material or services furnished pursuant to paragraph 1. In such negotiations, this point shall be considered: that each government will assume the responsibility for all such claims of its nationals and such claims arising in its jurisdiction of nationals of any third country.

9. The two governments will, upon the request of either of them, consult regarding any matter relating to the application of these understandings or to operations or arrangements carried out pursuant to these understandings.

10. Nothing herein shall be construed to alter, amend or otherwise modify the agreements between the United States of America and Iran, signed at Tehran November 27, 1943,¹ and October 6, 1947,² as amended or extended.³

I propose that, if these understandings meet with the approval of the Government of Iran, this note and your note concurring therein will be considered as confirming these understandings, effective on the date of your note and thereafter until one year after the date of receipt by either Government of a notification in writing of the intention of the other Government to terminate these understandings.

Accept, Sir, the renewed assurances of my high consideration.

JAMES E. WEBB
*Acting Secretary of State
of the
United States of America*

MR. GHOLAM ABBAS ARAM,
Chargé d'Affaires ad interim of Iran.

*The Iranian Chargé d'Affaires ad interim to the Acting Secretary
of State*

IRANIAN EMBASSY
WASHINGTON D. C.

MAY 23, 1950

EXCELLENCY,

I have the honor to acknowledge the receipt of Your Excellency's note dated May 23, 1950 and, upon the instructions of my Government, to draw your attention to the conversations which have recently taken place between the representatives of our two Governments concerning the transfer of military assistance by the Government of the United States of America

¹ Executive Agreement Series, No. 361; 57 Stat. 1262.

² Treaties and Other International Acts Series, No. 1666; 61 Stat. 3306.

³ Treaties and Other International Acts Series, Nos. 1941, 1924, and 2068.

to the Government of Iran pursuant to Public Law 329, 81st Congress of the United States of America and to confirm the understandings reached as a result of those conversations as follows:

1. The Government of the United States of America, recognizing this principle that economic recovery is essential to international peace and security and must be given clear priority, undertakes to make or continue to make available to the Government of Iran on a grant basis such equipment, materials and services as the Government of the United States of America may authorize. The furnishing of any such assistance as may be authorized pursuant hereto shall be consistent with the Charter of the United Nations and shall be subject to all of the applicable terms and conditions and termination provisions of the Mutual Defense Assistance Act of 1949 and such other applicable laws of the United States of America relating to the transfer of military assistance. The two Governments will, from time to time, negotiate detailed arrangements necessary to carry out the provisions of this paragraph.

2. The Government of Iran undertakes to make effective use of assistance received pursuant to paragraph one for the purposes for which such assistance was furnished and will not devote such assistance to purposes other than those for which it was furnished in accordance with these understandings.

3. In the common security interest of both Governments, the Government of Iran undertakes not to transfer to any person not an officer or agent of such Government or to any other nation title to or possession of any equipment, materials or services received on a grant basis pursuant to paragraph one, without the prior consent of the Government of the United States of America.

4. The Government of Iran, after giving due consideration to reasonable requirements for domestic use and commercial export of Iran, which are to be determined by the Iranian Government itself, agrees to facilitate the production, transport, export and transfer to the Government of the United States of America, for such period of time, in such quantities and upon such terms and conditions as to the value, method of payment, etc., as may be agreed upon, of raw and semi-processed materials required by the United States of America as a result of deficiencies or potential deficiencies in its own resources, and which may be available in Iran.

5. (A) The Government of Iran will take appropriate measures which are not inconsistent with security and the interests of the country to keep the public informed of operations pursuant to these understandings.

(B) Each Government will take such security measures as may be agreed in each case between the two Governments in order to prevent the disclosure or compromise of materials, services or information furnished by the other Government pursuant to these understandings.

6. The Government of Iran, except as may otherwise be agreed between the two Governments, shall grant duty-free treatment and exemption from internal taxation on importation or exportation to products, property, materials or equipment imported into its territory in connection with this understanding.

7. The Government of Iran agrees to receive technical personnel of the Government of the United States of America who will discharge in its territory the responsibilities of the Government of the United States of America for implementing the provisions of these understandings and to accord them necessary facilities to observe the progress of assistance furnished pursuant thereto.

8. The two Governments will, upon request to either of them, negotiate appropriate arrangements between them respecting responsibility for patent or similar claims based on the use of devices, processes, technological information or other forms of property protected by law in connection with equipment, material or services furnished pursuant to paragraph one. In such negotiations this point shall be considered: that each Government will assume the responsibility for all such claims of its nationals and such claims arising in its jurisdiction of nationals of any third country.

9. The two Governments will, upon the request of either of them, consult regarding any matter relating to the application of these understandings or to operations or arrangements carried out pursuant to these understandings.

10. Nothing herein shall be construed to alter, amend or otherwise modify the agreements between the United States of America and Iran, signed at Tehran November 27, 1943 and October 6, 1947 as amended or extended.

I have the honor to concur in the proposals made in your note and to inform you that the understandings set forth therein meet with the approval of the Government of Iran. That note and the present note, accordingly, are considered as confirming these understandings, effective on this date and thereafter until one year after the date of receipt by either Government of a notification in writing of the intention of the other Government to terminate these understandings.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

G. A. ARAM

G. A. Aram,

Chargé d'Affaires ad Interim of Iran.

His Excellency

JAMES E. WEBB,

*Acting Secretary of State of the
United States of America,*

Washington, D. C.

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA
AND YUGOSLAVIA

*Exchange of notes signed at Belgrade, November 20 and 21, 1950;
in force November 21, 1950 **

*The American Ambassador to the Yugoslav Deputy Minister of
Foreign Affairs*

NOVEMBER 20, 1950.

DEAR MR. MINISTER:

I have the honor to refer to the request submitted to the Secretary of State of the Government of the United States on October 20, 1950 by the Ambassador of the Federal People's Republic of Yugoslavia¹ for assistance to meet the emergency in Yugoslavia resulting from the recent drought. Particular reference is made to that part of your country's shortages which affects the continued ability of your Government to support the food requirements of its military forces. It is understood that the drought prevailing in Yugoslavia and the consequent shortage of food is so drastic as to seriously impair the ability of your Government to defend itself against aggression. Our two Governments are both desirous of fostering international peace and security within the framework of the Charter of the United Nations² through measures which will further the ability of nations dedicated to the purposes and principles of the Charter to participate effectively in arrangements for individual and collective self-defense in support of those purposes and principles. Accordingly, I am pleased to inform you that my Government is prepared, pursuant to the provisions of Public Law 329, 81st Congress,³ as amended, to supply assistance in aid of food requirements of the armed forces of your Government on the following mutually agreed basis that (1) your Government will use the assistance exclusively for the purpose for which it is furnished, namely, in furtherance of the purposes of the Charter of the United Nations, to prevent the weakening of the defenses of the Federal People's Republic of Yugoslavia; (2) that your Government agrees not to transfer to any other nation the assistance furnished pursuant to this agreement without the prior consent of this Government; (3) that your Government will provide the United States with reciprocal assistance by continuing to facilitate the production and transfer to the United States, in such quantities and upon such terms and conditions as may be agreed on, of raw and semi-processed materials required by the United States as

* Department of State, Treaties and Other International Acts Series, No. 2145 (Publication 4059).

¹ Not printed.

² Treaty Series 993; 59 Stat., Pt. 2, p. 1031.

³ 63 Stat., Pt. 1, p. 714; this JOURNAL, Supp., Vol. 44 (1950), p. 29.

a result of deficiencies or potential deficiencies in its own resources, and which may be available in Yugoslavia. Arrangements for such transfers shall give due regard to requirements for domestic use and commercial export of Yugoslavia; (4) that your Government is prepared to make available to the Government of the United States of America dinars for the use of the United States of America for any administrative expenditures within Yugoslavia in connection with assistance furnished by the United States of America to Yugoslavia arising out of this agreement. Our two Governments will at the appropriate time initiate discussion with a view to determining the amount of such dinars and to agree upon arrangements for the furnishing of such dinars.

I have the honor to propose that this note, together with the reply of the Government of Yugoslavia giving these assurances, constitute an agreement, effective on the date of your reply.

I take this occasion, Mr. Minister, to renew the assurances of my highest consideration.

GEORGE V. ALLEN

DR. LEO MATES,
*Deputy Minister of Foreign Affairs,
Ministry of Foreign Affairs,
Belgrade.*

*The Yugoslav Deputy Minister of Foreign Affairs to the American
Ambassador*

NOVEMBER 21, 1950

DEAR MR. AMBASSADOR,

I have the honour to acknowledge receipt of your Note dated November 20, 1950 which reads as follows:

"Dear Mr. Minister,

I have the honour to refer to the request submitted to the Secretary of State of the Government of the United States on October 20, 1950 by the Ambassador of the Federal People's Republic of Yugoslavia for assistance to meet the emergency in Yugoslavia resulting from the recent drought. Particular reference is made to that part of your country's shortages which affects the continued ability of your Government to support the food requirements of its military forces. It is understood that the drought prevailing in Yugoslavia and the consequent shortage of food is so drastic as to seriously impair the ability of your Government to defend itself against aggression. Our two Governments are both desirous of fostering international peace and security within the framework of the Charter of the United Nations through measures which will further the ability of nations dedicated to the purposes and principles of the Charter to participate effectively in arrangements for individual and

collective self-defense in support of those purposes and principles. Accordingly, I am pleased to inform you that my Government is prepared, pursuant to the provisions of Public Law 329, 81st Congress, as amended, to supply assistance in aid of food requirements of the armed forces of your Government on the following mutually agreed basis that (1) your Government will use the assistance exclusively for the purpose for which it is furnished, namely, in furtherance of the purposes of the Charter of the United Nations, to prevent the weakening of the defenses of the Federal People's Republic of Yugoslavia; (2) that your Government agrees not to transfer to any other nation the assistance furnished pursuant to this agreement without the prior consent of this Government; (3) that your Government will provide the United States with reciprocal assistance by continuing to facilitate the production and transfer to the United States, in such quantities and upon such terms and conditions as may be agreed on, of raw and semi-processed materials required by the United States as a result of deficiencies or potential deficiencies in its own resources, and which may be available in Yugoslavia. Arrangements for such transfers shall give due regard to requirements for domestic use and commercial export of Yugoslavia; (4) that your Government is prepared to make available to the Government of the United States of America dinars for the use of the United States of America for any administrative expenditures within Yugoslavia in connection with assistance furnished by the United States of America to Yugoslavia arising out of this agreement. Our two Governments will at the appropriate time initiate discussion with a view to determining the amount of such dinars and to agree upon arrangements for the furnishing of such dinars.

I have the honour to propose that this note, together with the reply of the Government of Yugoslavia giving these assurances, constitute an agreement, effective on the date of your reply.

I take this occasion, Mr. Minister, to renew the assurances of my highest consideration."

I have the honour to inform you that the Government of the Federal People's Republic of Yugoslavia is in full agreement with the above text, and take this occasion, Mr. Ambassador, to renew the assurances of my highest consideration.

L. MATES

Mr. GEORGE ALLEN,
United States Ambassador,
Embassy of the United States,
Beograd

ITALY-UNITED STATES OF AMERICA

CONCILIATION COMMISSION

ESTABLISHED PURSUANT TO ARTICLE 83 OF THE TREATY OF PEACE

RULES OF PROCEDURE

*Adopted at Rome, June 29, 1950 **

ARTICLE 1

TITLE OF THE COMMISSION

The Commission, established by the Government of the United States of America and the Government of Italy, pursuant to Article 83 of the Treaty of Peace, shall be known as the "Italian-United States Conciliation Commission."

ARTICLE 2

JURISDICTION

The Commission shall have jurisdiction over all disputes between the Government of the United States of America and the Government of Italy which may arise in the application or interpretation of Articles 75 and 78 and Annexes XIV, XV, and XVII, Part B, of the Treaty of Peace, as implemented by the Memoranda of Understanding and Exchanges of Notes dated August 14, 1947, the Exchange of Notes dated February 24, 1949, and any other agreement entered into by the United States of America and Italy to the extent that said agreement refers to the above Articles or Annexes of the Treaty of Peace.¹

ARTICLE 3

PLACE AND TIME OF SITTINGS

- (a) The Commission shall have its seat at Rome.
- (b) Hearings and other sittings of the Commission shall be held at such places and times as the Commission may agree upon from time to time.

* Text supplied by the United States Representative on the Commission, Mr. Emmett A. Scanlan, Jr.

¹ For texts of Peace Treaty of Feb. 10, 1947, Memoranda of Understanding and Exchanges of Notes of Aug. 14, 1947, see this JOURNAL, Supp., Vol. 42 (1948), pp. 47, 146 ff.

ARTICLE 4

AGENTS

Each of the two Governments shall be represented before the Commission by a duly designated Agent or Deputy Agent.

The Commission will not receive or consider any statement or document unless presented through the respective Agents, or ordered produced by the Commission.

The term "Agents," as used in these rules, shall be deemed to include the Deputy Agents.

ARTICLE 5

SECRETARIAT

(a) A Secretariat shall be established at the seat of the Commission, which will be subject to its direction.

(b) The Secretariat shall have custody of the Official Registers and Records of the Commission; the original of all documents and records shall be retained by the Secretariat as the archives of the Commission.

(c) The Secretariat shall endorse on each document presented to the Commission the date of filing, and make an entry thereof in both Registers.

(d) The Secretariat shall furnish, in conformity with these rules or on Order of the Commission, certified true copies of any statement or document in the archives of the Commission.

(e) All records and documentary evidence received by the Commission shall be preserved by the Secretariat in safe files of the Commission until released by an Order of the Commission duly entered of record.

ARTICLE 6

REGISTERS AND RECORDS

(a) Two Official Registers, one in English and one in Italian, shall be maintained by the Secretariat. The two Registers shall be identical in content and both texts shall have equal validity. There shall be entered in both Registers the name of the physical or juridical person on whose behalf each case is initiated before the Commission, the subject of the dispute, and the date of filing, together with all acts connected with the proceedings.

(b) Each dispute filed with the Commission shall constitute a separate case and shall be registered as such in consecutive order.

(c) The Secretariat shall maintain two Minute Books, one in English and one in Italian, in which shall be entered a chronological record of each session of the Commission. The two Minute Books shall be identical in content and both texts shall have equal validity. The Minutes shall be approved by the members of the Commission and signed by the Secretaries.

(d) The Secretariat shall keep any additional records which may be required by these rules or prescribed from time to time by the Commission.

ARTICLE 7

INSTITUTION OF PROCEEDINGS

(a) Proceedings before the Commission shall be initiated by the formal filing with the Secretariat of a Petition signed by the Agent of the claiming Government. The Petition must contain

(i) the name and address of the physical or juridical person on whose behalf the proceedings are initiated;

(ii) the name and address of the legal representative, if any, of the person on whose behalf the Agent of the claiming Government initiates the proceedings, together with documentary evidence of the authority of such legal representative to act on behalf of his principal;

(iii) a clear and concise statement of the facts in the case; each material allegation should be set forth in a separate paragraph insofar as possible;

(iv) a clear and concise statement of the principles of law upon which the dispute is based;

(v) a complete statement setting forth the purpose of the Petition and the relief requested.

(b) The Agent of the claiming Government shall deposit with the Secretariat at the time the Petition is filed all documentary evidence then in his possession upon which the case is based, together with an index thereof, in conformity with the provisions of Article 9 hereof. If the Agent of the claiming Government desires the Commission to consider any other proof, a request for such consideration must be made specifically in the Petition.

(c) In connection with any dispute, the Agents of the two Governments may file with the Secretariat an Agreed Statement of Facts, signed by both, substantially in accordance with the provisions of paragraph (a) of this Article and accompanied by all documentary evidence in support of or in opposition to the said dispute. Upon the filing of such an Agreed Statement of Facts, and the approval of such agreement by the Commission, the provisions of these rules relative to pleadings, trial and proof are no longer applicable.

(d) The Petition must be filed in original and five (5) copies, together with an index of the documentary evidence presented. The original and all copies are to be signed by the Agent of the claiming Government.

(e) The Secretariat shall enter each case in the Registers of the Commission and shall return to the Agent a receipted copy of the Petition duly signed, stamped, numbered and dated. When an Agreed Statement of

Facts is filed, the Secretariat shall return a receipted copy thereof to each Agent.

(f) Within two (2) days after the filing of the Petition, the Secretariat shall present a copy thereof, together with a copy of the index of the documentary evidence presented, to the Agent of the other Government and to each member of the Commission.

ARTICLE 8

ANSWER AND OTHER PLEADINGS

(a) Within thirty (30) days after the date of filing the Petition, as described in Article 7 hereof, the Answer signed by the Agent of the respondent Government must be filed, which Answer must contain

(i) a clear and concise statement of the facts presented in the Petition of the claiming Government which are admitted as true by the respondent Government;

(ii) a clear and concise statement of any other element of fact upon which the respondent Government is relying in its defense of the case; each material allegation should be set forth in a separate paragraph insofar as possible;

(iii) a clear and concise statement of the principles of law upon which the dispute is based.

(b) The Agent of the respondent Government shall deposit with the Secretariat at the time the Answer is filed all documentary evidence then in his possession upon which the defense of the case is based, together with an index thereof, in conformity with the provisions of Article 9 hereof. If the Agent of the respondent Government desires the Commission to consider any other proof a request for such consideration must be made specifically in the Answer.

(c) When the claiming Government desires to file a Reply to the Answer of the respondent Government, it shall within fifteen (15) days after the filing of the Answer make written request to the Commission for an Order establishing the time limit for filing the Reply. The Reply shall deal only with the allegations made in the Answer, which raise factual or legal defenses or new matter not alleged or adequately treated by the claiming Government in the Petition. No documentary evidence may be filed with the Reply, except that which refutes an element of fact presented in the Answer.

(d) When a Counter-Reply is deemed necessary by the respondent Government, it shall within fifteen (15) days after the filing of the Reply make written request to the Commission for an Order establishing the time limit for filing the Counter-Reply; but in no event shall such time limit exceed that granted to the claiming Government for the filing of the Reply.

The Counter-Reply shall deal only with the allegations made in the Reply, which raise factual or legal considerations or new matter not alleged or adequately treated by the respondent Government in the Answer. No documentary evidence may be filed with the Counter-Reply, except that which refutes an element of fact presented in the Reply.

(e) Filing and distribution of the Answer and of the other pleadings shall conform with the provisions of Article 7 hereof.

(f) The presentation and filing of all documentary evidence shall be governed by the provisions of Article 9 hereof.

ARTICLE 9

DOCUMENTARY EVIDENCE

(a) All documentary evidence upon which either Government intends to rely must be annexed to the Petition of the claiming Government, or to the Answer of the respondent Government, to the Reply, or to the Counter-Reply, respectively.

(b) No other documentary evidence may be filed subsequently, except such evidence as the Commission may order produced.

(c) When documentary evidence upon which one of the Governments intends to rely is in the possession or custody of persons or in places subject to the jurisdiction of the other Government, the Agent of the latter Government shall insure, upon a request timely made, that such document, or a certified true copy thereof, is transmitted to the Secretariat of the Commission for inclusion in the file.

(d) Documents are exhibited in the original; if same is not possible, certified true copies will be received. Documents may be printed, type-written, or in legible handwriting, and photostatic, mimeographed or carbon copies thereof may be used.

(e) The Agent of either Government may inspect at the Secretariat of the Commission any document filed by the other Government and may obtain certified true copies thereof, at its [*sic*] own expense.

ARTICLE 10

TRIAL AND PROOF

(a) The Commission does not hear oral testimony save in exceptional cases for good cause shown and upon Order of the Commission authorizing its admission and fixing the time when and the place where it shall be received. Should oral testimony be introduced in behalf of one Government, the Agent for the other Government shall have the right of cross-examination.

(b) The Commission may order in exceptional cases officials of either Government to receive the sworn testimony of a witness taken in answer to

written questions prepared by the Agent of either Government and approved by the Commission; the Order of the Commission shall name the witness whose sworn testimony is to be taken and shall specify the time when, the place where, the official before whom the witness shall testify, as well as the questions to be asked.

(c) If the Agents of the two Governments have reached an agreement upon any point involved in the case, without the necessity for judicial proof, the Agents shall file with the Secretariat a declaration of such agreement, signed by both Agents, clearly stating that the particular point is not an issue in the dispute; and thereafter such agreement shall be binding on the two Governments in the case.

(d) Before giving testimony, witnesses shall take the oath in accordance with the terms of the law of the place where such testimony is to be given or in accordance with the law of the country of which they are nationals, as the Commission shall determine in each particular instance.

(e) The Commission may in its discretion

(i) grant extensions of time for the filing of pleadings;

(ii) appoint experts to advise it on any point in dispute;

(iii) designate interpreters and translators;

(iv) proceed to places where the property in dispute is located, and in such instances the Agents of the two Governments shall be invited to be present.

(f) Any public document or report, printed or published by order of either of the two Governments, may be considered by the Commission without being proved if identified by the Agent of either Government in the pleadings or arguments; and such matter will be given such weight as the Commission shall deem proper in each case. Reference may be made, without the necessity of formal proof, to laws, statutes, judicial decisions and publications of recognized authorities on questions pertinent to matters regarding which the Commission is called upon to decide.

ARTICLE 11

BRIEFS AND ORAL ARGUMENTS

(a) The Commission may request the Agents to develop their arguments orally after they have completed the submission of proof. The Agents may file a written citation of legal authorities.

(b) When both Agents have concluded the formal submission of proof in a particular case, the Agent of either Government may advise the Commission of the desire of his Government to submit a Brief; and, if the Commission does not direct otherwise, the Government requesting same shall be granted thirty (30) days within which to file such Brief. The other Government may file a Reply Brief within fifteen (15) days after the filing of the original Brief.

(c) Each Brief filed shall contain in separate parts

- (i) a concise statement of the object of the dispute;
- (ii) a complete and concise statement of the facts, based upon the evidence;
- (iii) a concise statement of the points upon which the Government relies; and
- (iv) a statement setting forth the points of law relied upon and any discussion of the evidence deemed necessary to support the statement of facts.

(d) Filing and distribution of Briefs shall conform to the requirements of Article 7 hereof.

ARTICLE 12

LANGUAGES

(a) Pleadings and Briefs may be submitted in either English or Italian. Supporting statements, affidavits, and documentary evidence may be submitted in any language.

(b) Oral arguments before the Commission may be made in either English or Italian.

ARTICLE 13

DECISIONS

(a) The Decision shall contain:

- (i) a declaration of the Commission's jurisdiction;
- (ii) the names of the parties and of the persons on whose behalf the proceedings have been initiated and defended;
- (iii) the object of the dispute;
- (iv) a statement of the material facts and legal arguments;
- (v) the ruling affirming or denying in whole or in part, the obligations of each Government party to the dispute;
- (vi) an Order regarding costs;
- (vii) the signatures of the members of the Commission concurring in the Decision and the date such Decision is adopted.

(b) The Decision shall be filed in English and in Italian, both texts being authenticated originals; it shall be deposited with the Secretariat, which shall furnish certified true copies thereof immediately to the Agents of each Government.

(c) The Decision shall be definitive and binding on the two Governments, as provided in the Treaty of Peace.

ARTICLE 14

NON-AGREEMENT

(a) If, within three (3) months after a dispute has been referred to the Commission, no agreement has been reached, the two members of the Commission, or either of them, may issue a Procès-Verbal of Non-Agreement, setting forth the points of agreement, if any, and the points of non-agreement. A Procès-Verbal of Non-Agreement may be supplemented by any statement in writing which either of them may desire to make with respect to the case or any point involved therein.

(b) The Procès-Verbal of Non-Agreement shall be deposited with the Secretariat, which shall furnish promptly certified true copies thereof to the Agents of each Government.

ARTICLE 15

COMMISSION OF THREE MEMBERS

(a) The Agents shall notify their Governments when a Procès-Verbal of Non-Agreement has been issued by the two members of the Commission, or either of them, in a particular dispute.

(b) The Third Member of the Commission, appointed pursuant to the procedure set forth in Article 83 of the Treaty of Peace, shall preside at all hearings and other sittings in those cases in which a Procès-Verbal of Non-Agreement has been issued.

(c) Proceedings before the Commission of three members shall be limited to the points on which no agreement has been reached. Agreement on points previously reached by the two members shall be final and non-reviewable.

(d) The Third Member at all times shall have the right to have access to the full and complete record in any case, even though part of the record may include references to a point on which the Representatives of the two Governments have reached an agreement. The Third Member of the Commission, in his discretion, may hear additional oral argument on any point on which no agreement has been reached.

ARTICLE 16

DECISIONS OF THE COMMISSION OF THREE MEMBERS

(a) The Commission of three members shall decide by majority vote the points still in dispute. The Decision shall state the points upon which agreement was reached previously by the two members of the Commission and those remaining in dispute for which a Decision of the Commission of three members is required. In all other respects the Decision shall comply with the provisions of Article 13 of these rules.

(b) When a Decision shall not be reached by unanimous vote, the member in the minority shall have the right to deposit with the Secretariat a statement of the reason for his dissent.

(c) The Decision and any dissent thereto shall be communicated to the two Governments according to the provisions of Article 13 of these rules.

ARTICLE 17

COMPUTATION OF TIME

Whenever these rules, or an Order of the Commission, establish a certain number of days for the accomplishment of a procedural act, the date from which the period begins to run shall not be counted and the last day of the period shall be counted; and Sundays and legal holidays of either Government shall be excluded, in accordance with a list of such holidays published by the Commission.

ARTICLE 18

MODIFICATION OF RULES OF PROCEDURE

The Commission, whether consisting of two or three members, shall have the right to deviate from these Rules of Procedure in individual cases, either by agreement or by a ruling of the majority. These Rules of Procedure may be amended, modified or supplemented at any time by agreement of the Representatives of the two Governments.

ADOPTED and promulgated in Rome on the 29th day of June, 1950.

*The Representative of the
United States of America
on the Italian-United States
Conciliation Commission*

(signed) EMMETT A. SCANLAN, JR.

*The Representative of the
Italian Republic on the
Italian-United States Con-
ciliation Commission*

(signed) ANTONIO SORRENTINO

PANAMA-UNITED STATES OF AMERICA

CLAIMS CONVENTION

*Signed at Panamá, January 26, 1950; ratifications exchanged at Panamá
October 11, 1950; in force October 11, 1950 **

The United States of America and the Republic of Panamá, animated by the desire to strengthen the bonds of friendship existing between them, and being desirous of adjusting certain pecuniary claims of each country against the other, have resolved to fix by means of a Convention the bases of settlement of such claims with a view to their prompt and just liquidation, and to this end have named as their Plenipotentiaries:

The President of the United States of America:

His Excellency Monnett B. Davis, Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic of Panamá;

The President of the Republic of Panamá:

His Excellency Doctor Carlos N. Brin, Minister of Foreign Relations of the Republic of Panamá;

Who, after having communicated to each other their respective full powers, found to be in good and proper form, have agreed on the following articles:

ARTICLE I

The Government of the United States of America and the Government of the Republic of Panamá recognize that it is most desirable for both countries to eliminate from their relations with each other any cause for difference and to dispose of, on an equitable basis and without reference to the legal aspect of the controversies, the following group of claims, which have been outstanding for some considerable time:

(a) The claims of the Republic of Panamá against the United States of America, which were the subject of a recommendation of the Joint Land Commission, United States and Panamá, with respect to damages caused by the fire which occurred in the Malambo section in the year 1906;

(b) The claims of the United States of America against the Republic of Panamá for personal injuries sustained by six soldiers of the United States Army during disturbances which occurred in the city of Panamá in the year 1915; and

* Department of State, Treaties and Other International Acts Series, No. 2129 (Publication 4027).

(c) The claims of the United States of America against the Republic of Panamá arising as a consequence of the judgment rendered by the Supreme Court of Justice of the Republic of Panamá on October 20, 1931, through which there were declared as the property of the nation certain lands called *El Encanto*, which several nationals of the United States of America alleged that they acquired in good faith.

ARTICLE II

It is agreed that the claims mentioned in Article I of this Convention shall be settled as follows:

(a) The Government of the United States of America agrees to pay the Government of the Republic of Panamá the sum of \$53,800.00 (fifty-three thousand eight hundred dollars), currency of the United States of America, with respect to property losses sustained by nationals of the Republic of Panamá as a consequence of the fire occurring in the Malambo section in 1906;

(b) The Government of the Republic of Panamá agrees to pay the Government of the United States of America the sum of \$3,156.00 (three thousand one hundred fifty-six dollars), currency of the United States of America, with respect to personal injuries sustained by six soldiers of the United States Army in the disturbances occurring in 1915; and

(c) The Government of the Republic of Panamá agrees to pay the Government of the United States of America the sum of \$400,000.00 (four hundred thousand dollars), currency of the United States of America, with respect to property losses suffered by several nationals of the United States of America in relation to the lands called *El Encanto*.

ARTICLE III

The Government of the Republic of Panamá agrees to pay and the Government of the United States of America agrees to accept the amount of \$349,356.00 (three hundred forty-nine thousand three hundred fifty-six dollars), currency of the United States of America, as the net balance due the latter, in accordance with the provisions of Article II, as full and final adjustment and as full settlement of the claims mentioned in that Article. This amount will be remitted by the Government of the Republic of Panamá to the Government of the United States of America, in Washington, D. C., in two payments of \$174,678.00 (one hundred seventy-four thousand six hundred seventy-eight dollars), currency of the United States of America, each, and the first payment is to be made in a period of six months after the exchange of the ratifications of this Convention, and the second payment one year after the first payment has been effected.

ARTICLE IV

The individual claims referred to in subparagraphs (b) and (c) of Article II of this Convention shall be finally adjudicated by an agency established or designated by the Government of the United States of America. If, upon such adjudication, such agency shall find that the sum of \$400,000.00 (four hundred thousand dollars) referred to in subparagraph (c) of Article II is in excess of the total sum of claims, encompassed by that subparagraph, and which may be determined to be valid, plus the cost of adjudication, if any, not borne by the claimants, the Government of the United States of America shall take the necessary steps to return such excess to the Government of the Republic of Panamá.

ARTICLE V

With reference to the so-called El Encanto claims, the Government of the Republic of Panamá expressly declares that, in agreeing to the settlement of those claims, it has not ignored or disregarded the decision rendered by the Supreme Court of the Republic of Panamá in the litigation relating to the El Encanto lands, which judgment sets forth the legal aspects of the matter. In agreeing to the settlement of those claims, the Government of the Republic of Panamá is prompted by reasons of strictest equity to make good the loss suffered by several nationals of the United States of America who acted in good faith in the acquisition of the lands to which reference is made.

With reference to the so-called Malambo fire claims, the Government of the United States of America declares that its agreement to effect settlement of those claims is prompted by similar considerations of equity and without reference to the question of liability.

ARTICLE VI

Upon the execution of the provisions of the present Convention, the Government of the United States of America and the Government of the Republic of Panamá shall consider as reciprocally cancelled, renounced, and satisfied all claims referred to herein. Any other unsettled claims on behalf of nationals of either country against the government of the other country, whether arising under the provisions of agreements between the two countries or under general principles of international law, are not affected by the provisions of this Convention.

ARTICLE VII

For the purpose of assisting the Government of the United States of America in making a proper distribution to the respective nationals of the United States of America of the amount to be paid as provided for herein,

the Government of the Republic of Panamá will deliver to the Government of the United States of America any documents in its possession which may have a bearing upon the merits of the individual claims of such nationals.

ARTICLE VIII

This Convention shall be ratified and shall enter into force upon the exchange of ratifications¹ which shall take place at Panamá as soon as possible.

IN WITNESS WHEREOF, the respective Plenipotentiaries have signed and affixed their seals to the present Convention.

DONE in duplicate, in Spanish² and English, at Panamá, this twenty-sixth day of January, 1950.

FOR THE UNITED STATES OF AMERICA:

MONNETT B. DAVIS

[SEAL]

FOR THE REPUBLIC OF PANAMA:

CARLOS N. BRIN

¹ Oct. 11, 1950.

² Spanish text not printed here.

UNITED KINGDOM-UNITED STATES OF AMERICA
EXCHANGE OF NOTES MODIFYING ARTICLES IV AND VI OF
AGREEMENT OF MARCH 27, 1941, ON LEASED NAVAL
AND AIR BASES

*Signed at Washington, July 19 and August 1, 1950;
in force August 1, 1950 **

The British Ambassador to the Secretary of State

No. 378
Ref: 1191/1/31/50

BRITISH EMBASSY,
WASHINGTON, D. C.
19th July 1950.

SIR,

I have the honour, under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, to refer to Article XXVIII of the Leased Bases Agreement of March 27th, 1941¹ between the Governments of the United Kingdom and the United States of America which provides that the Agreement may be modified by mutual consent after it has been in force for a reasonable time. In conformity with the provisions of the said Article, consultations have taken place in June 1946 and subsequently between representatives of the Governments of the United Kingdom and of the United States of America for the purpose of agreeing upon a mutually acceptable modification of the provisions of the Agreement in its application to Bermuda, the Bahamas, Jamaica, St. Lucia, Antigua, Trinidad and British Guiana, insofar as those provisions relate to jurisdiction. In accordance with their understanding of the agreement reached as a result of those consultations, His Majesty's Government in the United Kingdom wish to propose the substitution of the provisions of the new Article IV annexed hereto for the original provisions of Article IV of the Agreement of March 27th, 1941.

2. I have also to propose, under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, that Article VI of the Agreement of March 27th, 1941 shall have effect as if the words "(except where, under Article IV, jurisdiction is to be exercised by the United States or is not exercisable by the courts of the Territory)" were substituted for the words "(except in cases where the United States authorities elect to assume and exercise jurisdiction in accordance with Article IV (1))."

* Department of State, Treaties and Other International Acts Series, No. 2105 (Publication 3974).

¹ Executive Agreement Series 235; 55 Stat., Pt. 2, p. 1560; this JOURNAL, Supp., Vol. 35 (1941), p. 134.

3. If the proposals set out in the two preceding paragraphs of this note are acceptable to the Government of the United States of America, I suggest that this note and Your Excellency's reply thereto be regarded as constituting an agreement between the two Governments modifying Articles IV and VI of the said Agreement of March 27th, 1941, with effect from the date of Your Excellency's reply.

I avail myself of this opportunity to renew to you the assurance of my highest consideration.

OLIVER FRANKS.

The Honourable

DEAN G. ACHESON,

*Secretary of State of the United States,
Washington, D. C.*

ARTICLE IV

Jurisdiction

(1) The Government of the United States of America shall have the right to exercise the following jurisdiction over offences committed in the Territory:

- (a) Where the accused is a member of a United States force,
 - (i) if a state of war exists, exclusive jurisdiction over all offences wherever committed;
 - (ii) if a state of war does not exist, exclusive jurisdiction over security offences wherever committed and United States interest offences committed inside the Leased Areas; concurrent jurisdiction over all other offences wherever committed.
- (b) Where the accused is a British subject or a local alien and a civil court of the United States is sitting in the Territory, exclusive jurisdiction over security offences committed inside the Leased Areas.
- (c) Where the accused is not a member of a United States force, a British subject or a local alien, but is a person subject to United States military or naval law,
 - (i) if a state of war exists, exclusive jurisdiction over security offences committed inside the Leased Areas; and United States interest offences committed inside the Leased Areas; concurrent jurisdiction over all other offences wherever committed;
 - (ii) if a state of war does not exist and there is no civil court of the United States sitting in the Territory, exclusive jurisdiction over security offences which are not punishable under the law of the Territory; concurrent jurisdiction over all other offences committed inside the Leased Areas.

- (iii) if a state of war does not exist and a civil court of the United States is sitting in the Territory, exclusive jurisdiction over security offences committed inside the Leased Areas; concurrent jurisdiction over all other offences wherever committed.
 - (d) Where the accused is not a member of a United States force, a British subject or a local alien, and is not a person subject to United States military or naval law, and a civil court of the United States is sitting in the Territory, exclusive jurisdiction over security offences committed inside the Leased Areas; concurrent jurisdiction over all other offences committed inside the Leased Areas and, if a state of war exists, over security offences committed outside the Leased Areas.
- (2) Wherever, under paragraph (1) of this Article, the Government of the United States of America has the right to exercise exclusive jurisdiction over security offences committed inside the Leased Areas, such right shall extend to security offences committed outside the Leased Areas which are not punishable under the law of the Territory.
- (3) In every case in which under this Article the Government of the United States of America has the right to exercise jurisdiction and the accused is a British subject, a local alien or, being neither a British subject nor a local alien, is not a person subject to United States military or naval law, such jurisdiction shall be exercisable only by a civil court of the United States sitting in the Territory.
- (4) In every case in which under this Article the Government of the United States of America has the right to exercise exclusive jurisdiction the following provisions shall have effect:
- (a) The United States authorities shall inform the Government of the Territory as soon as is practicable whether or not they elect to exercise such jurisdiction over any alleged offences which may be brought to their attention by the competent authorities of the Territory or in any other case in which the United States authorities are requested by the competent authorities of the Territory to furnish such information.
 - (b) If the United States authorities elect to exercise such jurisdiction, the accused shall be brought to trial accordingly, and the courts of the Territory shall not exercise jurisdiction except in aid of a court or authority of the United States, as required or permitted by the law of the Territory.
 - (c) If the United States authorities elect not to exercise such jurisdiction, and if it shall be agreed between the Government of the Territory and the United States authorities that the alleged offender shall be brought to trial, nothing in this Article shall affect the exercise of jurisdiction by the courts of the Territory in the case.

(5) In every case in which under this Article the Government of the United States of America has the right to exercise concurrent jurisdiction, the following provisions shall have effect:

- (a) The case shall be tried by such court as may be arranged between the Government of the Territory and the United States authorities.
- (b) Where an offence is within the jurisdiction of a civil court of the Territory and of a United States military or naval court, conviction or acquittal of the accused by one such court shall not exclude subsequent trial by the other, but in the event of such subsequent trial the court in awarding punishment shall have regard to any punishment awarded in the previous proceedings.
- (c) Where the offence is within the jurisdiction of a civil court of the Territory and of a civil court of the United States, trial by one shall exclude trial by the other.

(6) Notwithstanding anything contained elsewhere in this Article, when a state of war exists in which the Government of the United Kingdom is, and the Government of the United States of America is not, engaged, then in any case in which the Government of the United States of America would, but for this paragraph, have exclusive jurisdiction, that jurisdiction shall be concurrent in respect of any of the following offences against any part of His Majesty's dominions committed outside the Leased Areas or, if not punishable by the Government of the United States of America in the Territory, inside the Leased Areas:

- (a) treason;
- (b) any offence of the nature of sabotage or espionage or against any law relating to official secrets;
- (c) any other offence relating to operations, in the Territory, of the Government of any part of His Majesty's dominions, or to the safety of His Majesty's naval, military or air bases or establishments or any part thereof or of any equipment or other property of any such Government in the Territory.

(7) Nothing in this Article shall give the Government of the United States of America the right to exercise jurisdiction over a member of a United Kingdom Dominion or Colonial armed force, except that, if a civil court of the United States is sitting in the Territory and a state of war does not exist or a state of war exists in which the Government of the United States of America is, and the Government of the United Kingdom is not, engaged, the Government of the United States of America shall have the right, where the accused is a member of any such force, to exercise concurrent jurisdiction over security offences committed inside the Leased Areas.

(8) Nothing in this Article shall affect the jurisdiction of a civil court of the Territory except as expressly provided in this Article.

(9) In this Article the following expressions shall have the meanings hereby assigned to them:

- (a) "British subject" shall not include a person who is both a British subject and a member of a United States force.
- (b) "local alien" means a person, not being a British subject, a member of a United States force or a national of the United States, who is ordinarily resident in the Territory.
- (c) "member of a United States force" means a member (entitled to wear the uniform) of the naval, military or air forces of the United States of America.
- (d) "security offence" means any of the following offences against the United States and punishable under the law thereof:
 - (i) treason;
 - (ii) any offence of the nature of sabotage or espionage or against any law relating to official secrets;
 - (iii) any other offence relating to operations, in the Territory, of the Government of the United States of America, or to the safety of the United States Naval or Air Bases or establishments or any part thereof or of any equipment or other property of the Government of the United States of America in the Territory.
- (e) "state of war" means a state of actual hostilities in which either the Government of the United Kingdom or the Government of the United States of America is engaged and which has not been formally terminated, as by surrender.
- (f) "United States interest offence" means an offence which (excluding the general interest of the Government of the Territory in the maintenance of law and order therein) is solely against the interests of the Government of the United States of America or against any person (not being a British subject or local alien) or property (not being property of a British subject or local alien) present in the Territory by reason only of service or employment in connection with the construction, maintenance, operation or defence of the Bases.

The Secretary of State to the British Ambassador

DEPARTMENT OF STATE

WASHINGTON

Aug. 1, 1950

EXCELLENCY:

I have the honor to acknowledge the receipt of your note of July 19, 1950, the terms of which are as follows:

"Sir,

I have the honour, under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, to refer to Article XXVIII of the Leased Bases Agreement of March 27th, 1941 between the Governments of the United Kingdom and the United States of America which provides that the Agreement may be modified by mutual consent after it has been in force for a reasonable time. In conformity with the provisions of the said Article, consultations have taken place in June 1946 and subsequently between representatives of the Governments of the United Kingdom and of the United States of America for the purpose of agreeing upon a mutually acceptable modification of the provisions of the Agreement in its application to Bermuda, the Bahamas, Jamaica, St. Lucia, Antigua, Trinidad and British Guiana, insofar as those provisions relate to jurisdiction. In accordance with their understanding of the agreement reached as a result of those consultations, His Majesty's Government in the United Kingdom wish to propose the substitution of the provisions of the new Article IV annexed hereto for the original provisions of Article IV of the Agreement of March 27th, 1941.

"2. I have also to propose, under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, that Article VI of the Agreement of March 27th, 1941 shall have effect as if the words '(except where, under Article IV, jurisdiction is to be exercised by the United States or is not exercisable by the courts of the Territory)' were substituted for the words '(except in cases where the United States authorities elect to assume and exercise jurisdiction in accordance with Article IV (1)).'

"3. If the proposals set out in the two preceding paragraphs of this note are acceptable to the Government of the United States of America, I suggest that this note and Your Excellency's reply thereto be regarded as constituting an agreement between the two Governments modifying Articles IV and VI of the said Agreement of March 27th, 1941, with effect from the date of Your Excellency's reply."

2. In reply I have the honor to inform Your Excellency that the Government of the United States of America accepts the proposals concerning Articles IV and VI of the Leased Bases Agreement of March 27, 1941 as set forth in your note, and this reply and Your Excellency's note will be regarded as constituting an agreement between the two Governments modifying Articles IV and VI of the said Agreement of March 27, 1941 with effect from this date.

Accept, Excellency, the renewed assurances of my highest consideration.

DEAN ACHESON

His Excellency

The Right Honorable

Sir OLIVER SHEWELL FRANKS, K.C.B., C.B.E.,
British Ambassador.

OFFICIAL DOCUMENTS

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UNITED NATIONS
REPORT OF THE INTERNATIONAL LAW COMMISSION
COVERING ITS THIRD SESSION, MAY 16-JULY 27, 1951¹

CHAPTER I

INTRODUCTION

ORGANIZATION OF THE THIRD SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947 and in accordance with the Statute of the Commission annexed thereto, held its third session at Geneva, Switzerland, from 16 May to 27 July 1951.

2. The Commission consists of the following members:

<i>Name</i>	<i>Nationality</i>
Mr. Ricardo J. Alfaro	Panama
Mr. Gilberto Amado	Brazil
Mr. James Leslie Brierly	United Kingdom of Great Britain and Northern Ireland
Mr. Roberto Córdova	Mexico
Mr. J. P. A. François	Netherlands
Mr. Shuhsi Hsu	China
Mr. Manley O. Hudson	United States of America
Faris Bey el Khouri	Syria
Mr. Vladimir M. Koretsky	Union of Soviet Socialist Republics
Sir Benegal Narsing Rau	India
Mr. A. E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Jean Spiropoulos	Greece
Mr. J. M. Yepes	Colombia
Mr. Jaroslav Zourek	Czechoslovakia

3. With the exception of Messrs. Vladimir M. Koretsky and Jaroslav Zourek and Sir Benegal Narsing Rau, who were unable to attend, all the members of the Commission were present at the third session. Faris Bey el-Khouri attended meetings of the Commission as from 30 May, and Mr. Manley O. Hudson as from 31 May 1951.

¹ U. N. General Assembly, 6th Sess., Official Records, Supp. No. 9, Doc. A/1858; see also Doc. A/CN.4/48, July 30, 1951.

4. The Commission elected, for a term of one year, the following officers:

<i>Chairman:</i>	Mr. James Leslie Brierly;
<i>First Vice-Chairman:</i>	Mr. Shihsi Hsu;
<i>Second Vice-Chairman:</i>	Mr. J. M. Yepes;
<i>Rapporteur:</i>	Mr. Roberto Córdova

5. Mr. Ivan S. Kerno, Assistant Secretary-General for Legal Affairs, represented the Secretary-General. Mr. Yuen-li Liang, Director of the Division for the Development and Codification of International Law, acted as Secretary of the Commission.

AGENDA

6. The Commission adopted an agenda for the third session, consisting of the following items:

(1) General Assembly resolution 484 (V) of 12 December 1950: review by the International Law Commission of its Statute with the object of recommending revisions thereof to the General Assembly.

(2) Preparation of a draft code of offences against the peace and security of mankind:

(a) Report by Mr. Spiropoulos;

(b) General Assembly resolution 488 (V) of 12 December 1950: formulation of the Nürnberg principles.

(3) General Assembly resolution 378 B (V) of 17 November 1950: duties of States in the event of the outbreak of hostilities.

(4) Law of treaties:

(a) Report by Mr. Brierly;

(b) General Assembly resolution 478 (V) of 16 November 1950: reservations to multilateral conventions.

(5) Arbitral procedure: report by Mr. Seale.

(6) Regime of the high seas: report by Mr. François.

(7) Date and place of the fourth session.

(8) Economic and Social Council resolution 319 B III (XI) of 11 August 1950 requesting the International Law Commission to prepare the necessary draft international convention or conventions for the elimination of statelessness.

(9) Co-operation with other bodies.

(10) General Assembly resolution 494 (V) of 20 November 1950: development of a twenty-year programme for achieving peace through the United Nations.

(11) Other General Assembly resolutions relating to the report of the International Law Commission on its second session:

(a) General Assembly resolution 485 (V) of 12 December 1950: amendment to Article 13 of the Statute of the International Law Commission;

(b) General Assembly resolution 486 (V) of 12 December 1950: extension of the term of office of the present members of the International Law Commission;

(c) General Assembly resolution 487 (V) of 12 December 1950: ways and means for making the evidence of customary international law more readily available;

(d) General Assembly resolution 489 (V) of 12 December 1950: international criminal jurisdiction.

7. In the course of its third session, the Commission held fifty-three meetings. It considered all the items in the foregoing agenda, with the exception of that of arbitral procedure (item 5). On this subject, the Commission had before it a "Second Report on Arbitration Procedure" (A/CN.4/46), presented by Mr. Scelle, special rapporteur, who submitted therein a "Second Preliminary Draft on Arbitration Procedure." This report was held over for consideration at the next session.

MATTERS FOR THE CONSIDERATION OF THE GENERAL ASSEMBLY

8. The Commission completed its study on the following items:
- (1) Reservations to multilateral conventions (item 4(b));
 - (2) The question of defining aggression (item 3); and
 - (3) Preparation of a draft code of offences against the peace and security of mankind (item 2).

The reports of the Commission on these three items are contained respectively in Chapters II, III and IV of the present document and are submitted to the General Assembly for its consideration.

9. With regard to item 1 of the agenda, review by the International Law Commission of its Statute, the Commission concluded only the first phase of its work on the subject. Its report on this item, which may be found in Chapter V of the present document, is submitted to the General Assembly for its consideration. The Commission will further pursue the review of its Statute at its next session, in the light of the action of the General Assembly upon the recommendation of the Commission as contained in the said chapter.

MATTERS FOR THE INFORMATION OF THE GENERAL ASSEMBLY

10. On the basis of the reports of its respective special rapporteurs, the Commission undertook further consideration of the following items:

- (1) Law of treaties (item 4(a)); and
- (2) Regime of the high seas (item 6).

The progress in the work done by the Commission on these items is related respectively in Chapters VI and VII of the present document for the information of the General Assembly.

11. In addition to the aforementioned subjects, the Commission gave consideration to the other items of its agenda and took certain decisions in connexion therewith. These are contained in Chapter VIII of the present document.

CHAPTER II

RESERVATIONS TO MULTILATERAL CONVENTIONS

12. By resolution 478 (V), adopted on 16 November 1950, the General Assembly, *inter alia*,

“2. Invites the International Law Commission:

“(a) In the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law; to give priority to this study and to report thereon, especially as regards multilateral conventions of which the Secretary-General is the depositary, this report to be considered by the General Assembly at its sixth session;

“(b) In connexion with this study, to take account of all the views expressed during the fifth session of the General Assembly, and particularly in the Sixth Committee;”²

13. In pursuance of this resolution, the International Law Commission, in the course of its third session, gave priority to a study of the question of reservations to multilateral conventions and considered it at its 100th to 106th, 125th to 128th and 133rd meetings, inclusive. The Commission had before it a “Report on Reservations to Multilateral Conventions” (A/CN.4/41) submitted by Mr. Brierly, special rapporteur on the topic of the law of treaties, as well as memoranda presented by Messrs. Amado (A/CN.4/L.9, and Corr. 1) and Scelle (A/CN.4/L.14). In addition, the Commission studied the Official Records of the fifth session of the General Assembly relating to the item, and took account of the views contained therein.

14. It will be recalled that the Commission had, during its first session (1949), selected the law of treaties as one of the topics of international law for codification and had given it priority. In the course of its study of this topic during its second session (1950), the Commission had, on the basis of a report by Mr. Brierly (A/CN.4/23), embarked upon a preliminary discussion of the question of reservations to treaties. There was then a large measure of agreement on general principles and particularly on the point that “a reservation requires the consent at least of all parties to become effective. But the application of these principles in detail to the great

² This JOURNAL, Supp., Vol. 45 (1951), p. 14.

variety of situations which may arise in the making of multilateral treaties was felt to require further consideration.”³

15. By the same resolution referred to in paragraph 12 above, the General Assembly also requested the International Court of Justice to give an advisory opinion on the following questions:

“In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification:

“I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

“II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving State and:

“(a) The parties which object to the reservation:

“(b) Those which accept it?

“III. What would be the legal effect as regards the answer to question I if an objection to a reservation is made:

“(a) By a signatory which has not yet ratified?

“(b) By a State entitled to sign or accede but which has not yet done so?”⁴

16. On 28 May 1951, the International Court of Justice, by 7 votes to 5, gave an advisory opinion in which the questions referred to it as quoted in the preceding paragraph are answered as follows (*Reservations to the Convention on Genocide*, Advisory Opinion: *I.C.J. Reports* 1951, pp. 29 and 30):

“THE COURT IS OF OPINION,

“In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide, in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification,

“On Question I:

“that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

“On Question II:

“(a) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Con-

³ General Assembly, 5th Sess., Official Records, Supp. No. 12 (A/1316), par. 164; this JOURNAL, Supp., Vol. 44 (1950), p. 140.

⁴ *Ibid.*, Supp., Vol. 45 (1951), p. 14.

vention, it can in fact consider that the reserving State is not a party to the Convention;

“(b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention;

“*On Question III:*

“(a) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

“(b) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.”⁵

The advisory opinion of the Court was accompanied by two dissenting opinions of four judges and one judge, respectively. The International Law Commission has studied these opinions with care.

17. The Commission notes that the task entrusted to it by the General Assembly differs from that of the Court in two important respects. In the first place, the Commission has been invited to study the question of reservations to multilateral conventions in general, especially as regards multilateral conventions of which the Secretary-General of the United Nations is the depositary, whereas the questions submitted to the Court related solely to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. The Court underlined the nature of its task in the following words:

“All three questions are expressly limited by the terms of the Resolution of the General Assembly to the Convention on the Prevention and Punishment of the Crime of Genocide, and the same Resolution invites the International Law Commission to study the general question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law. The questions thus having a clearly defined object, the replies which the Court is called upon to give to them are necessarily and strictly limited to that Convention.” (*I.C.J. Reports* 1951, p. 20.)

Moreover, in seeking to determine what kind of reservations might be made to the Convention on Genocide and what kind of objections might be taken to such reservations, the Court said:

“The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of

⁵ This JOURNAL, Vol. 45 (1951), pp. 589-590.

the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties." (*I.C.J. Reports* 1951, p. 23.)

In the second place, the Commission has been asked to study the question "both from the point of view of codification and from that of the progressive development of international law," while the Court gave its advisory opinion on the basis of its interpretation of the existing law. The Commission therefore feels that it is at liberty to suggest the practice which it considers the most convenient for States to adopt for the future.

18. According to the practice of the League of Nations, a reservation to a multilateral convention, to be valid, had to be accepted by all the contracting parties. This practice was reviewed and endorsed by the Committee of Experts for the Progressive Codification of International Law of the League of Nations which stated in a report (*League of Nations Official Journal*, 8th Year, No. 7, p. 880) :

"In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void."

The report of the Committee of Experts was considered by the Council of the League of Nations on 15 and 17 June, 1927. On the latter date, the Council adopted a resolution, in which it, *inter alia*, directed the report "to be circulated to the Members of the League" and requested:

"The Secretary-General to be guided by the principles of the report regarding the necessity for acceptance by all the Contracting States, when dealing in future with reservations made after the close of a Conference at which a convention is concluded, subject, of course, to any special decisions taken by the Conference itself." (*League of Nations Official Journal*, Minutes of the 45th Session of the Council, pp. 770-772 and 800-801.)

In accordance with this resolution, the Secretary-General circulated the report to the Members of the League of Nations on 13 July 1927. (League of Nations document C.357.M.130.1927.V.) It appears that the principles of the report were observed by the Secretariat of the League of Nations and became an established practice thereof. (Hudson, *International Legislation*, Vol. I, p. L, note 3.)

19. The Secretary-General of the United Nations has followed substantially the practice of the League of Nations. In his report to the fifth session of the General Assembly, the Secretary-General stated his practice in the following terms (A/1372, paragraphs 5 and 6) :

"5. In the absence of stipulations in a particular convention regarding the procedure to be followed in the making and accepting of reserva-

tions, the Secretary-General, in his capacity as depositary, has held to the broad principle that a reservation may be definitively accepted only after it has been ascertained that there is no objection on the part of any of the other States directly concerned. If the convention is already in force, the consent, express or implied, is thus required of all States which have become parties up to the date on which the reservation is offered. Should the convention not yet have entered into force, an instrument of ratification or accession offered with a reservation can be accepted in definitive deposit only with the consent of all States which have ratified or acceded by the date of entry into force.

"6. Thus, the Secretary-General, on receipt of a signature or instrument of ratification or accession, subject to a reservation, to a convention not yet in force, has formally notified the reservation to all States which may become parties to the convention. In so doing, he has also asked those States which have ratified or acceded to the convention to inform him of their attitude towards the reservation, at the same time advising them that, unless they notify him of objections thereto prior to a certain date—normally the date of entry into force of the convention—it would be his understanding that they had accepted the reservation. States ratifying or acceding without express objection, subsequent to notice of a reservation, are advised of the Secretary-General's assumption that they have agreed to the reservation. If the convention were already in force when the reservation was received, the procedure would not differ substantially, except that a reasonable time for the receipt of objections would be allowed before tacit consent could properly be assumed."

The report further states (*ibid.*, paragraph 43):

"46. The rule adhered to by the Secretary-General as depositary may accordingly be stated in the following manner:

"A State may make a reservation when signing, ratifying or acceding to a convention, prior to its entry into force, only with the consent of all States which have ratified or acceded thereto up to the date of entry into force; and may do so after the date of entry into force only with the consent of all States which have theretofore ratified or acceded."

20. Because of its constitutional structure, the established practice of the International Labor Organization, as described in the Written Statement dated 12 January 1951 of the Organization submitted to the International Court of Justice in the case of *Reservations to the Convention on Genocide* (I.C.J. document Distr. 51/10, pp. 212-278), excludes the possibility of reservations to international labor conventions. However, the texts of these conventions frequently take account of the special conditions prevailing in particular countries by making such exceptional provisions for them as will admit of their proceeding to ratification; indeed, this course is enjoined on the General Conference by Article 19(3) and other articles of the Constitution of the Organization.

21. The Organization of American States follows a different system, as described in the Written Statement dated 14 December 1950 of the Pan American Union, submitted to the International Court of Justice in the

case of *Reservations to the Convention on Genocide* (I.C.J. document Distr. 51/10, pp. 11-16). A resolution, approved on 23 December 1938, of the Eighth International Conference of American States, held at Lima, Peru, provided that:

"In the event of adherence or ratification with reservations, the adhering or ratifying State shall transmit to the Pan American Union, prior to the deposit of the respective instrument, the text of the reservation which it proposes to formulate, so that the Pan American Union may inform the signatory States thereof and ascertain whether they accept it or not. The State which proposes to adhere to or ratify the Treaty, may do it or not, taking into account the observations which may be made with regard to its reservations by the signatory States." (*Final Act of the Eighth International Conference of American States*, Resolution XXIX, paragraph 2.)

Thus the tender of a reservation to a convention may delay the deposit by the reserving State of its ratification until enquiry can be made as to the attitude of the other signatory States with respect to the proposed reservation, and until the State offering the reservation has an opportunity to consider any observations made by other States. It does not preclude the reserving State, in spite of the fact that its reservation has been objected to by one or more signatory States, from proceeding to deposit its ratification definitively, if it so desires, and thereby becoming a party to the convention. It merely prevents the entry into force of the convention as between the reserving State and the objecting State. The legal position has been defined by the Governing Board of the Pan American Union in a resolution adopted on 4 May 1932, as follows (I.C.J. document Distr. 51/10, p. 13):

"With respect to the juridical status of treaties ratified with reservations, which have not been accepted, the Governing Board of the Pan American Union understands that:

"1. The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations, in the terms in which it was originally drafted and signed.

"2. It shall be in force as between the governments which ratify it with reservations and the signatory States which accept the reservations in the form in which the treaty may be modified by said reservations.

"3. It shall not be in force between a government which may have ratified with reservations and another which may have already ratified, and which does not accept such reservations."

22. The Commission recognizes that the members of a regional or continental organization may be in a special position, by reason of their common historical traditions and of their close cultural bonds, which have no counterpart in the relations of the general body of States. The members of the Organization of American States have adopted a procedure which they regard as suited to their needs. This procedure, as described in the preced-

ing paragraph, is designed to ensure the greatest number of ratifications. Yet an examination of the history of the conventions adopted by the Conferences of American States over the past twenty-five years has failed to convince the Commission that an approach to universality is necessarily assured or promoted by permitting a State which offers a reservation to which objection is taken to become a party *vis-à-vis* non-objecting States. In some multilateral conventions, the securing of universality may be the more important consideration; and when this is the case, it is always possible for States to adopt the procedure followed by the Pan American Union by inserting a suitable provision to this effect in the convention. But there are other multilateral conventions where the integrity and the uniform application of the convention are more important considerations than its universality, and the Commission believes that this is especially likely to be the case with conventions drawn up under the auspices of the United Nations. These conventions are of a law-making type in which each State accepts limitations on its own freedom of action on the understanding that the other participating States will accept the same limitations on a basis of equality. The Pan American Union practice is likely to stimulate the offering of reservations; the diversity of these reservations and the divergent attitudes of States with regard to them tend to split up a multilateral convention into a series of bilateral conventions and thus to reduce the effectiveness of the former. The Commission, therefore, does not recommend that this practice should be applied to multilateral conventions in general, when the parties themselves have failed to indicate their intention.*

23. The International Court of Justice, in its advisory opinion of 28 May 1951, quoted in paragraph 16 above, adopted, with regard to reservations to the Convention for the Prevention and Punishment of the Crime of Genocide, the criterion of the compatibility of a reservation with the "object and purpose" of the Convention. Thus, in its answer to Question I, the Court held "that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention;

* Mr. Yepes declared that he deeply regretted having to vote against this paragraph for the following reasons, which he had explained at length during the Commission's discussions:

(1) If the so-called Pan American system of making reservations could be successfully applied to a complex of States closely linked together and in intimate relations such as the Organization of American States, it could *a fortiori* be applied to a much vaster organization more loosely linked together such as the United Nations, whose universal character makes it less exacting in this respect than a purely regional organization such as the Organization of American States.

(2) As the Pan American system was, in his opinion, used in practice by the majority of the Members of the United Nations, it could be regarded as the existing law in the matter and, for that reason, should have been adopted by the Commission.

otherwise, that State cannot be regarded as being a party to the Convention." (*I.C.J. Reports* 1951, p. 29.) It was left to each State party to the Convention to apply the criterion of compatibility. "Each State which is a party to the Convention," according to the Court, "is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint." (*I.C.J. Reports* 1951, p. 26.) In its answer to Question II, the Court held that a party to the Genocide Convention "can in fact" consider that the reserving State is or is not a party to the Convention, accordingly as that party considers the reservation to be compatible or incompatible with the object and purpose of the Convention.

24. The Commission believes that the criterion of the compatibility of a reservation with the object and purpose of a multilateral convention, applied by the International Court of Justice to the Convention on Genocide, is not suitable for application to multilateral conventions in general. It involves a classification of the provisions of a convention into two categories, those which do and those which do not form part of its object and purpose. It seems reasonable to assume that, ordinarily at least, the parties regard the provisions of a convention as an integral whole, and that a reservation to any of them may be deemed to impair its object and purpose. Even if the distinction between provisions which do and those which do not form part of the object and purpose of a convention be regarded as one that it is intrinsically possible to draw, the Commission does not see how the distinction can be made otherwise than subjectively. If State A tenders a reservation which State B regards as compatible and State C regards as incompatible with the object and purpose of the convention, there is no objective test by which the difference may be resolved; even when it is possible to refer the difference of views to judicial decision, this might not be resorted to and, in any case, would involve delay. So long as the application of the criterion of compatibility remains a matter of subjective discretion, some of the parties being willing to accept a reservation and others not, the status of a reserving State in relation to the convention must remain uncertain. And where a convention confers jurisdiction on the International Court of Justice over disputes concerning the interpretation or application of its provisions, and such jurisdiction is invoked by a party, difficulty might arise in determining which are the parties to the convention entitled to intervene under Article 63 of the Court's Statute. Moreover, where, as frequently happens, the entry into force or the termination of a convention depends on the number of ratifications or denunciations deposited, even the status of the convention itself may be thrown into doubt.

25. The Commission has been asked to pay special attention to multilateral conventions of which the Secretary-General of the United Nations is the depositary and it believes that these considerations have a special pertinence to such conventions. The Secretary-General is already the depositary of more than a hundred such conventions, and he may be expected to become

the depositary of many more. The Commission is impressed with the complexity of the task which he would be required to discharge if reserving States can become parties to multilateral conventions despite the objections of some of the parties to their reservations. Situations may arise in which he would have to take a position, at least provisionally, concerning a difference of view as to the effect of a reservation tendered, and he would be expected to keep account of the manifold bilateral relationships into which such a rule would tend to split a multilateral convention.

26. When a multilateral convention is open for States generally to become parties, it is certainly desirable that it should have the widest possible acceptance. The very fact of its being open in this way indicates that it deals with some subject of wide international concern regarding which it is desirable to reform or amend existing laws. On the other hand, it is also desirable to maintain uniformity in the obligations of all the parties to a multilateral convention, and it may often be more important to maintain the integrity of a convention than to aim, at any price, at the widest possible acceptance of it. A reserving State proposes, in effect, to insert into a convention a provision which will exempt that State from certain of the consequences which would otherwise devolve upon it from the convention, while leaving the other States which are or may become parties to it fully subject to those consequences in their relations *inter se*. If a State is permitted to become a party to a multilateral convention while maintaining a reservation over the objection of any party to the convention, the latter may well feel that the consideration which prompted it to participate in the convention has been so far impaired by the reservation that it no longer wishes to remain bound by it.

27. It is always within the power of negotiating States to provide in the text of the convention itself for the limits within which, if at all, reservations are to be admissible and for the effect that is to be given to objections taken to them, and it is usually when a convention contains no such provisions that difficulties arise. It is much to be desired, therefore, that the problem of reservations to multilateral conventions should be squarely faced by the draftsmen of a convention text at the time it is being drawn up; in the view of the Commission, this is likely to produce the greatest satisfaction in the long run. Various provisions might be adopted, depending, in some measure at least, on the relative emphasis to be placed on maintaining the integrity of the text, or on facilitating the widest possible acceptance of it, even in varied terms.

(1) In some cases, it may be desirable that the text of a convention should exclude all possibility of reservations as was done in the European Broadcasting Convention, Copenhagen, 1948; this is particularly desirable in the case of international constitutional instruments.

(2) If some reservations are to be permitted, the precise text of the permissible reservations may be set out, as was done in the General Act of 26 September 1928 for the Pacific Settlement of International Disputes; or their scope may be limited by requiring them to relate only to particular parts of the text, as provided in the Convention on Road Traffic, Geneva, 1949.

(3) If the text places no limit on the admissibility of reservations, and if there is no established organizational procedure for dealing with reservations, the text should establish a procedure in respect of the tendering of reservations and their effect. Especially, it is important to make clear what States are to be qualified to make objections to reservations, within what time an objection is to be made in order to be admissible, and what the consequences of an objection are to be. Such a procedure should therefore cover, in particular, the following points:

- (a) How and when reservations may be tendered;
- (b) Notifications to be made by the depositary as regards reservations and objections thereto;
- (c) Categories of States entitled to object to reservations, and the manner in which their consent thereto may be given;
- (d) Time-limits within which objections are to be made;
- (e) Effect of the maintenance of an objection on the participation in the convention of the reserving State.

28. The Commission believes that multilateral conventions are so diversified in character and object that, when the negotiating States have omitted to deal in the text of a convention with the admissibility or effect of reservations, no single rule uniformly applied can be wholly satisfactory. Any rule may in some cases lead to arbitrary results. Hence, the Commission feels that its problem is not to recommend a rule which will be perfectly satisfactory, but that which seems to it to be the least unsatisfactory and to be suitable for application in the majority of cases. On the whole, the Commission believes that, subject to certain modifications as explained in paragraphs 29 and 30 below, such a rule is to be found in the practice hitherto followed by the Secretary-General of the United Nations. The Commission's views are formulated in some rules of practice, contained in paragraph 34 below.

29. The tender of a reservation constitutes, in substance, insofar as relations with the reserving State are concerned, a proposal of a new agreement, the terms of which would differ from those of the agreement embodied in the text of the convention. Such a new agreement would require acceptance by all the States concerned. The question arises, however, which are the States which can be said to be concerned. In the practice of the Secretary-General of the United Nations, described in

paragraph 19 above, only States which have ratified or otherwise accepted the convention are such States. Where a convention is subject to ratification or acceptance, the objection to a reservation, taken by a signatory State which has not ratified or otherwise accepted the convention, does not have the effect of excluding the reserving State from becoming a party to it. In the view of the Commission, however, the concern of a mere signatory State should also be taken into account; for at the time the reservation is tendered, a signatory State may be actively engaged in the study of the convention, or it may be in the process of completing the procedure necessary for its ratification, or for some reason, such as the assembling of its parliament, it may have been compelled to delay its ratification. In this connection, it has been suggested that a mere signatory to a convention should have the right of objecting only to reservations tendered before the convention has entered into force. Such a differentiation between reservations tendered before and those tendered after the entry into force of a convention would, however, be invidious where the entry into force of the convention is brought about as the result of the deposit of the ratifications of a very limited number of States, as in the case of the four Geneva Red Cross Conventions of 12 August 1949, to which more than sixty States are signatories, but which, it is provided, "shall come into force six months after not less than two instruments of ratification have been deposited." In such a case, a very few States might, by the tender and acceptance of reservations amongst themselves, so modify the terms of the convention that signatories, representing possibly the preponderant number of negotiating States, would find themselves confronted with a virtually new convention.

30. The Commission does not contemplate that a signatory State would advance an objection to a reservation from motives unrelated to its merits. Yet in order to guard against any possible abuse by a signatory State of its right to object to a reservation and to forestall the possibility of a reserving State being indefinitely prevented from becoming a party to a convention by a State which itself refrains from assuming the obligations of a party, the Commission suggests that, while the objection by a mere signatory to a reservation should have the effect of excluding a reserving State, a time-limit beyond which such effect would not endure should be prescribed. Taking into consideration the normal administrative and constitutional procedures of most governments in respect of the ratification of treaties and conventions, the Commission believes that a period of twelve months would be a reasonable time within which an objecting State could effect its ratification or acceptance of a convention. Accordingly, the Commission is of the opinion that if, upon the lapse of twelve months from the date a signatory State makes an objection to a reservation to a multilateral convention, it has not effected its ratification or acceptance of the convention, its objection should cease to have the effect of preventing the reserving State from becoming a party to the convention.

31. In some instances conventions are open to accession and not open to signature; an example is the Convention on the Privileges and Immunities of the United Nations of 13 February 1946. Such conventions, which are exceptional, present special problems with respect to reservations. As their number is somewhat limited, the Commission considers it unnecessary to formulate any practice applying to them.

32. The Commission is of the opinion that a duly accepted reservation to a multilateral convention limits the effect of the convention in the relations between the reserving State and the other States which have become parties to the convention.

CONCLUSIONS

33. The Commission suggests that organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them.

34. The Commission suggests that, in the absence of contrary provisions in any multilateral convention and of any organizational procedure applicable, the following practice should be adopted with regard to reservations to multilateral conventions, especially those conventions of which the Secretary-General of the United Nations is the depositary:

(1) The depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention.

(2) The depositary of a multilateral convention, in communicating a reservation to a State which is entitled to object, should at the same time request that State to express its attitude towards the reservation within a specified period, and such period may be extended if this is deemed to be necessary. If, within the period so specified or extended, a State fails to make its attitude towards the reservation known to the depositary, or if, without expressing an objection to the reservation, it signs, ratifies or otherwise accepts the convention within the period, it should be deemed to have consented to the reservation.

(3) The depositary of a multilateral convention should communicate all replies to its communications, in respect of any reservation to the convention, to all States which are or which are entitled to become parties to the convention.

(4) If a multilateral convention is intended to enter into force as a consequence of signature only, no further action being requisite, a State which offers a reservation at the time of signature may become a party to the convention only in the absence of objection by any State

which has previously signed the convention; when the convention is open to signature during a limited fixed period, only in the absence of objection by any State which becomes a signatory during that period.

(5) If ratification or acceptance in some other form, after signature, is requisite to bring a multilateral convention into force,

- (a) A reservation made by a State at the time of signature should have no effect unless it is repeated or incorporated by reference in the later ratification or acceptance by that State;
- (b) A State which tenders a ratification or acceptance with a reservation may become a party to the convention only in the absence of objection by any other State which, at the time the tender is made, has signed, or ratified or otherwise accepted the convention; when the convention is open to signature during a limited fixed period, also in the absence of objection by any State which signs, ratifies or otherwise accepts the convention after the tender is made but before the expiration of this period; provided, however, that an objection by a State which has merely signed the convention should cease to have the effect of excluding the reserving State from becoming a party, if within a period of twelve months from the time of the making of its objection, the objecting State has not ratified or otherwise accepted the convention.

CHAPTER III

QUESTION OF DEFINING AGGRESSION*

35. The General Assembly, on 17 November 1950, adopted resolution 378 B (V) which reads as follows:

"The General Assembly,

"Considering that the question raised by the proposal of the Union of Soviet Socialist Republics can better be examined in conjunction with matters under consideration by the International Law Commission, a subsidiary organ of the United Nations,

"Decides to refer the proposal of the Union of Soviet Socialist Republics and all the records of the First Committee dealing with this question to the International Law Commission, so that the latter may take them into consideration and formulate its conclusions as soon as possible."

36. The foregoing resolution was adopted in connexion with the agenda item "Duties of States in the Event of the Outbreak of Hostilities." The

* Mr. Hudson voted against this chapter of the report on the ground that in resolution 378 B (V) the General Assembly did not request the Commission to formulate a definition of aggression.

proposal of the Union of Soviet Socialist Republics (A/C.1/608), referred to in this resolution, was originally submitted to the First Committee of the General Assembly. It provided that the General Assembly "considering it necessary . . . to define the concept of aggression as accurately as possible," declares, *inter alia*, that "in an international conflict that State shall be declared the attacker which first commits" one of the acts enumerated in the proposal.

37. In pursuance of the resolution of the General Assembly, the International Law Commission, at its 92nd to 96th, 108th, 109th, 127th to 129th, and 133rd meetings, considered the question raised by the aforementioned proposal of the Soviet Union and, in that connexion, studied the records of the First Committee relating thereto.

38. The Commission first considered its terms of reference under the resolution in the light of the relevant discussions in the First Committee of the General Assembly. Some members of the Commission were of the opinion that this resolution merely meant that the Commission should take the Soviet proposal and the discussions thereon in the First Committee into consideration when preparing the draft code of offences against the peace and security of mankind. The majority of the Commission, however, held the view that the Commission had been requested by the General Assembly to make an attempt to define aggression and to submit a report on the result of its efforts.

39. The Commission had before it a report entitled "The Possibility and Desirability of a Definition of Aggression," presented by Mr. Spiropoulos, special rapporteur on the draft code of offences against the peace and security of mankind (A/CN.4/44, Chapter II). After a survey of previous attempts to define aggression, the special rapporteur stated that "whenever governments are called upon to decide on the existence or non-existence of 'aggression under international law,' they base their judgment on criteria derived from the 'natural,' so to speak, notion of aggression . . . and not on legal constructions." Analysing this notion of aggression, he stated that it was composed of both objective and subjective elements, namely, the fact that a State had committed an act of violence and was the first to do so and the fact that this violence was committed with an aggressive intention (*animus aggressionis*). But what kind of violence, direct or indirect, or what degree of violence constituted aggression could not be determined *a priori*. It depended on the circumstances in the particular case. He came to the conclusion that this "natural notion" of aggression is a "concept *per se*," which "is not susceptible of definition." "A 'legal' definition of aggression would be an artificial construction," which could never be comprehensive enough to comprise all imaginable cases of aggression, since the methods of aggression are in a constant process of evolution.

40. Two other members of the Commission, Mr. Amado and Mr. Alfaro, submitted memoranda on the question. Mr. Amado stated in his memo-

randum (A/CN.4/L.6 and Corr. 1) that a definition of aggression based on an enumeration of aggressive acts could not be satisfactory, as such an enumeration could not be complete and any omission would be dangerous. He suggested that the Commission might adopt a general and flexible formula laying down that:

“Any war not waged in exercise of the right of self-defence or in application of the provisions of Article 42 of the Charter of the United Nations [is] an aggressive war.”

Such a formula could, in his opinion, be applied to any factual situation and might be used by the competent organs of the United Nations without restricting their necessary freedom of action.

41. Mr. Alfaro, in his memorandum (A/CN.4/L.8), also advocated an abstract definition of aggression. On the basis of an examination of previous attempts to define aggression he expressed the view that the failure to find a satisfactory formula was due to the fact that these definitions had been based on the idea of an enumeration of various acts constituting aggression. In his opinion, a satisfactory result could be achieved only if the enumerative method which had proved unsuccessful were abandoned in favour of an effort to establish an abstract definition. He presented, in conclusion, a formula for such a definition (quoted in paragraph 46 below).

42. On the other hand, Mr. Yepes submitted a proposal (A/CN.4/L.7) for the determination of the aggressor based on the enumerative method. This proposal, however, was subsequently superseded by another proposal (A/CN.4/L.12) of the same author which defined aggression in general terms as follows:

“For the purposes of Article 39 of the United Nations Charter an act of aggression shall be understood to mean any direct or indirect use of violence (force) by a State or group of States against the territorial integrity or political independence of another State or group of States.

“Violence (force) exercised by irregular bands organized within the territory of a State or outside its territory with the active or passive complicity of that State shall be considered as aggression within the meaning of the preceding paragraph.

“The use of violence (force) in the exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter or in the execution of a decision duly adopted by a competent organ of the United Nations shall not be held to constitute an act of aggression.

“No political, economic, military or other consideration may serve as an excuse or justification for an act of aggression.”

43. Another proposal (A/CN.4/L.11 and Corr. 1) was submitted by Mr. Hsu in which particular stress was laid on indirect aggression. This draft was worded as follows:

“Aggression, which is a crime under international law, is the hostile act of a State against another State, committed by (a) the employment

of armed force other than in self-defence or the implementation of United Nations enforcement action; or (b) the arming of organized bands or of third States, hostile to the victim State, for offensive purposes; or (c) the fomenting of civil strife in the victim State in the interest of some foreign State; or (d) any other illegal resort to force, openly or otherwise."

44. Finally, Mr. Córdova, with a view to including in the draft code of offences against the peace and security of mankind a provision which would make aggression and the threat of aggression offences under the code, submitted the following draft (A/CN.4/L.10):

"Aggression, that is, the direct or indirect employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or execution of a decision by a competent organ of the United Nations.

"The threat of aggression should also be deemed to be a crime under this article."

45. The Commission considered the question whether it should follow the enumerative method or try to draft a definition of aggression in general terms. The sense of the Commission was that it was undesirable to define aggression by a detailed enumeration of aggressive acts, since no enumeration could be exhaustive. Furthermore, it was thought inadvisable to unduly limit the freedom of judgment of the competent organs of the United Nations by a rigid and necessarily incomplete list of acts constituting aggression. It was therefore decided that the only practical course was to aim at a general and abstract definition.

46. Undertaking to define aggression in general terms, the Commission took as a basis of discussion the text submitted by Mr. Alfaro in his memorandum (A/CN.4/L.8) as it was the broadest general definition before the Commission. Mr. Alfaro's draft read as follows:

"Aggression is the use of force by one State or group of States, or by any government or group of governments, against the territory and people of other States or governments, in any manner, by any methods, for any reasons and for any purposes, except individual or collective self-defence against armed attack or coercive action by the United Nations."

47. The Commission gave consideration to the question whether indirect aggression should be comprehended in the definition. It was felt that a definition of aggression should cover not only force used openly by one State against another, but also indirect forms of aggression such as the fomenting of civil strife by one State in another, the arming by a State of organized bands for offensive purposes directed against another State, and the sending of "volunteers" to engage in hostilities against another State. In this connexion account was taken of resolution 380(V), adopted by the General Assembly on 17 November 1950, which states, *inter alia*, that the General Assembly

“Solemnly reaffirms that, whatever the weapons used, any aggression, whether committed openly, or by fomenting civil strife in the interest of a foreign Power, or otherwise, is the gravest of all crimes against peace and security throughout the world.”

48. Opinion was divided on the question whether, in addition to the employment of force, the threat to use force should also constitute aggression. Some members of the Commission considered that threat of force amounted only to a threat of aggression, while others contended that it should be covered by the definition in view of the fact that threat of force had been used for aggressive purposes. The Commission finally decided to amend the definition proposed by Mr. Alfaro by including threat of force in the definition.

49. The Commission also adopted other drafting changes in the draft definition of Mr. Alfaro. This definition, as finally amended, read as follows:

“Aggression is the threat or use of force by a State or government against another State, in any manner, whatever the weapons employed and whether openly or otherwise, for any reason or for any purpose other than individual or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.”

50. Some members of the Commission, however, considered this definition unsatisfactory on the ground that, in their opinion, it did not comprehend all conceivable acts of aggression and that it might prove to be dangerously restrictive of the necessary freedom of action of the organs of the United Nations, if they were called upon in the future to apply the definition to specific cases. Some other members maintained that it did not include one or another element which they deemed essential.

51. When submitted to the final vote, the definition was rejected by 7 votes to 3, with one abstention, the vote being taken by roll call at the request of one member, as follows:

In favour: Messrs. Alfaro, Córdova and François

Against: Messrs. Amado, Brierly, Hsu, el-Khouri, Sandström, Spiropoulos and Yepes

Abstaining: Mr. Hudson

Absent: Mr. Scelle

52. Mr. Alfaro thereupon proposed that the Commission should not abandon its efforts to define aggression but should make further attempts on the basis of each of the texts submitted by other members. This proposal was rejected by a roll call of 6 to 4, with one abstention, as follows:

In favour: Messrs. Alfaro, Córdova, Hsu and Yepes

Against: Messrs. Amado, Brierly, François, Hudson, el-Khouri and Sandström

Abstaining: Mr. Spiropoulos

Absent: Mr. Scelle

53. The matter was later reconsidered at the request of Mr. Scelle, who in a memorandum (A/CN.4/L.19 and Corr. 1) submitted a general definition of aggression and proposed that aggression should be explicitly declared to be an offence against the peace and security of mankind. Mr. Scelle's definition read as follows:

"Aggression is an offence against the peace and security of mankind. This offence consists in any resort to force contrary to the provisions of the Charter of the United Nations, for the purpose of modifying the state of positive international law in force or resulting in the disturbance of public order."

This proposal was discussed in connexion with the preparation of the draft code of offences against the peace and security of mankind. Proposals were made by other members to a similar effect. The Commission decided to include among the offences defined in the draft code any act of aggression and any threat of aggression.

The following paragraphs were therefore inserted in Article 2 of the draft code:

"The following acts are offences against the peace and security of mankind:

"(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.

"(2) Any threat by the authorities of a State to resort to an act of aggression against another State."

CHAPTER IV

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

INTRODUCTION

54. By resolution 177(II) of 21 November 1947, the General Assembly decided:

"To entrust the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal to the International Law Commission, the members of which will, in accordance with resolution 174(II), be elected at the next session of the General Assembly,"

and directed the Commission to

"(a) Formulate the principles of international law recognized in the

Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and

“(b) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (a) above.”

In 1950, the International Law Commission reported to the General Assembly its formulation under sub-paragraph (a) of resolution 177(II).⁶ By resolution 488(V) of 12 December 1950, the General Assembly invited the Governments of Member States to express their observations on the formulation, and requested the Commission:

“In preparing the draft code of offences against the peace and security of mankind, to take account of the observations made on this formulation by delegations during the fifth session of the General Assembly and of any observations which may be made by Governments.”

55. The preparation of a draft code of offences against the peace and security of mankind was given preliminary consideration by the Commission at its first session, in 1949, when the Commission appointed Mr. J. Spiropoulos special rapporteur on the subject, and invited him to prepare a working paper for submission to the Commission at its second session. The Commission also decided that a questionnaire should be circulated to Governments inquiring what offences, apart from those recognized in the Charter and judgment of the Nürnberg Tribunal, should be included in the draft code.

56. At its second session, in 1950, Mr. Spiropoulos presented his report (A/CN.4/25) to the Commission, which took it as a basis of discussion. The subject was considered by the Commission at its 54th to 62nd and 72nd meetings. The Commission also took into consideration the replies received from Governments (A/CN.4/19, Part II, A/CN.4/19/Add.1 and Add.2) to its questionnaire. In the light of the deliberations of the Commission, a drafting committee, composed of Messrs. Alfaro, Hudson and Spiropoulos, prepared a provisional text (A/CN.4/R.6) which was referred by the Commission without discussion to Mr. Spiropoulos, who was requested to continue the work on the subject and to submit a new report to the Commission at its third session.

57. At the third session, in 1951, Mr. Spiropoulos submitted a second report (A/CN.4/44) containing a new draft of a code and also a digest of the observations on the Commission's formulation of the Nürnberg principles made by delegations during the fifth session of the General Assembly. The Commission also had before it the observations received from Governments (A/CN.4/45 and Corr. 1, A/CN.4/45/Add.1 and Add.2) on this formulation. Taking into account the observations referred to above, the Commission considered the subject at its 89th to 92nd, 106th to 111th, 129th

⁶ General Assembly, 5th Sess., Official Records, Supp. No. 12, Doc. A/1316, p. 11; this JOURNAL, Supp., Vol. 44(1950), p. 125.

and 133rd meetings, and adopted a draft Code of Offences against the Peace and Security of Mankind as set forth herein below.

58. In submitting this draft code to the General Assembly, the Commission wishes to present the following observations as to some general questions which arose in the course of the preparation of the text:

(a) The Commission first considered the meaning of the term "offences against the peace and security of mankind," contained in resolution 177(II). The view of the Commission was that the meaning of this term should be limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and security. For these reasons, the draft code does not deal with questions concerning conflicts of legislation and jurisdiction in international criminal matters; nor does it include such matters as piracy, traffic in dangerous drugs, traffic in women and children, slavery, counterfeiting currency, damage to submarine cables, etc.

(b) The Commission thereafter discussed the meaning of the phrase "indicating clearly the place to be accorded to" the Nürnberg principles. The sense of the Commission was that this phrase should not be interpreted as meaning that the Nürnberg principles would have to be inserted in their entirety in the draft code. The Commission felt that the phrase did not preclude it from suggesting modification or development of these principles for the purpose of their incorporation in the draft code. It was not thought necessary to indicate the exact extent to which the various Nürnberg principles had been incorporated in the draft code. Only a general reference to the corresponding Nürnberg principles was deemed practicable.

(c) The Commission decided to deal with the criminal responsibility of individuals only. It may be recalled in this connexion that the Nürnberg Tribunal stated in its judgment: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

(d) The Commission has not considered itself called upon to propose methods by which a code may be given binding force. It has therefore refrained from drafting an instrument for implementing the code. The offences set forth are characterized in Article 1 as international crimes. Hence, the Commission has envisaged the possibility of an international tribunal for the trial and punishment of persons committing such offences. The Commission has taken note of the action of the General Assembly in setting up a special committee to prepare draft conventions and proposals relating to the establishment of an international criminal court. Pending the establishment of a competent international criminal court, a transitional measure might be adopted providing for the application of the code by national courts. Such a measure would doubtless be considered in drafting the instrument by which the code would be put into force.

TEXT OF THE DRAFT CODE

59. The Draft Code of Offences against the Peace and Security of Mankind, as adopted by the Commission, reads as follows:

ARTICLE 1

Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punishable.

This article is based upon the principle of individual responsibility for crimes under international law. This principle is recognized by the Charter and judgment of the Nürnberg Tribunal, and in the Commission's formulation of the Nürnberg principles it is stated as follows: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment."

ARTICLE 2

The following acts are offences against the peace and security of mankind:

(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.

In laying down that any act of aggression is an offence against the peace and security of mankind, this paragraph is in consonance with resolution 380(V), adopted by the General Assembly on 17 November 1950, in which the General Assembly solemnly reaffirms that any aggression "is the gravest of all crimes against peace and security throughout the world."

The paragraph also incorporates, in substance, that part of Article 6, paragraph (a), of the Charter of the Nürnberg Tribunal, which defines as "crimes against peace," *inter alia*, the "initiation or waging of a war of aggression. . . ."

While every act of aggression constitutes a crime under paragraph (1), no attempt is made to enumerate such acts exhaustively. It is expressly provided that the employment of armed force in the circumstances specified in the paragraph is an act of aggression. It is, however, possible that aggression can be committed also by other acts, including some of those referred to in other paragraphs of Article 2.

Provisions against the use of force have been included in many international instruments, such as the Covenant of the League of Nations, the Treaty for the Renunciation of War of 27 August 1928, the Anti-War Treaty of Non-Aggression and Conciliation, signed at Rio de Janeiro, 10 October 1933, the Act of Chapultepec of 8 March 1945, the Pact of the Arab League of 22 March 1945, the Inter-American Treaty of Reciprocal Assistance of 2 September 1947, and the Charter of the Organization of American States, signed at Bogotá, 30 April 1948.

The use of force is prohibited by Article 2, paragraph 4, of the Charter of the United Nations, which binds all Members to "refrain in their international relations from the . . . use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations." The same prohibition is contained in the draft Declaration on Rights and Duties of States, prepared by the International Law Commission,⁷ which, in Article 9, provides that "Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the . . . use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order."

The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

(2) Any threat by the authorities of a State to resort to an act of aggression against another State.

This paragraph is based upon the consideration that not only acts of aggression but also the threat of aggression present a grave danger to the peace and security of mankind and should be regarded as an international crime.

Article 2, paragraph 4, of the Charter of the United Nations prescribes that all Members shall "refrain in their international relations from the threat . . . of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." The same prohibition is contained in the draft Declaration on Rights and Duties of States, prepared by the International Law Commission, which, in Article 9, provides that "Every State has the duty . . . to refrain from the threat . . . of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order."

The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

(3) The preparation by the authorities of a State for the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.

In prohibiting the preparation for the employment of armed force (except under certain specified conditions) this paragraph incorporates in substance that part of Article 6, paragraph (a), of the Charter of the Nürnberg Tribunal which defines as "crimes against peace," *inter alia*, "planning" and "preparation" of "a war of aggression. . . ." As used in this paragraph the term "preparation" includes "plan-

⁷ This JOURNAL, Supp., Vol. 44 (1950), p. 15.

ning." It is considered that "planning" is punishable only if it results in preparatory acts and thus becomes an element in the preparation for the employment of armed force.

The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

(4) The incursion into the territory of a State from the territory of another State by armed bands acting for a political purpose.

The offence defined in this paragraph can be committed only by the members of the armed bands, and they are individually responsible. A criminal responsibility of the authorities of a State under international law may, however, arise under the provisions of paragraph (12) of the present article.

(5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.

In its resolution 380(V) of 17 November 1950, the General Assembly declared that "fomenting civil strife in the interest of a foreign Power" was aggression.

The draft Declaration on Rights and Duties of States prepared by the International Law Commission provides, in Article 4: "Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife."

The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

(6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.

Article 1 of the Convention for the Prevention and Punishment of Terrorism of 16 November 1937 contained a prohibition of the encouragement by a State of terrorist activities directed against another State.

The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

(7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character.

It may be recalled that the League of Nations' Committee on Arbitration and Security considered the failure to observe conventional restrictions such as those mentioned in this paragraph as raising, under many circumstances, a presumption of aggression. (Memorandum on Articles 10, 11 and 16 of the Covenant, submitted by Mr. Rutgers, League of Nations document C.A.S. 10., 6 February, 1928.)

The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

(8) Acts by authorities of a State resulting in the annexation, contrary to international law, of territory belonging to another State or of territory under an international régime.

Annexation of territory in violation of international law constitutes a distinct offence, because it presents a particularly lasting danger to the peace and security of mankind. The Covenant of the League of Nations, in Article 10, provided that "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League." The Charter of the United Nations, in Article 2, paragraph 4, stipulates that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. . . ." Illegal annexation may also be achieved without overt threat or use of force, or by one or more of the acts defined in the other paragraphs of the present article. For this reason the paragraph is not limited to annexation of territory achieved by the threat or use of force.

The term "territory under an international régime" envisages territories under the international trusteeship system of the United Nations as well as those under any other form of international régime.

The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

(9) Acts by the authorities of a State or by private individuals, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, including:

- (i) Killing members of the group;
- (ii) Causing serious bodily or mental harm to members of the group;
- (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (iv) Imposing measures intended to prevent births within the group;
- (v) Forcibly transferring children of the group to another group.

The text of this paragraph follows the definition of the crime of genocide contained in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide.

The offence defined in this paragraph can be committed both by authorities of a State and by private individuals.

(10) **Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article.**

This paragraph corresponds substantially to Article 6, paragraph (c) of the Charter of the Nürnberg Tribunal, which defines "crimes against humanity." It has, however, been deemed necessary to prohibit also inhuman acts on cultural grounds, since such acts are no less detrimental to the peace and security of mankind than those provided for in the said Charter. There is another variation from the Nürnberg provision. While, according to the Charter of the Nürnberg Tribunal, any of the inhuman acts constitutes a crime under international law only if it is committed in execution of or in connexion with any crime against peace or war crime as defined in that Charter, this paragraph characterizes as crimes under international law inhuman acts when these acts are committed in execution of or in connexion with other offences defined in the present article.

The offence defined in this paragraph can be committed both by authorities of a State and by private individuals.

(11) **Acts in violation of the laws or customs of war.**

This paragraph corresponds to Article 6, paragraph (b), of the Charter of the Nürnberg Tribunal. Unlike the latter, it does not include an enumeration of acts which are in violation of the laws or customs of war, since no exhaustive enumeration has been deemed practicable.

The question was considered whether every violation of the laws or customs of war should be regarded as a crime under the code or whether only acts of a certain gravity should be characterized as such crimes. The first alternative was adopted.

This paragraph applies to all cases of declared war or of any other armed conflict which may arise between two or more States, even if the existence of a state of war is recognized by none of them.

The United Nations Educational, Scientific and Cultural Organization has urged that wanton destruction, during an armed conflict, of historical monuments, historical documents, works of art or any other cultural objects should be punishable under international law. (Letter of 17 March 1950 from the Director-General of UNESCO to the International Law Commission transmitting a "Report on the International Protection of Cultural Property, by Penal Measures, in the Event of Armed Conflict," document 5C/PRG/6 Annex I/UNESCO/MUS/Conf.1/20 (rev.), 8 March 1950.) It is understood that such destruction comes within the purview of the present paragraph. Indeed, to some extent, it is forbidden by Article 56 of the Regulations annexed to the 4th Hague Convention of 1907 respecting the Laws and Customs of War on Land, and by Article 5 of the 9th Hague Convention of 1907 respecting Bombardment by Naval Forces in Time of War.

The offence defined in this paragraph can be committed both by authorities of a State and by private individuals.

(12) **Acts which constitute:**

- (i) **Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or**
- (ii) **Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or**
- (iii) **Attempts to commit any of the offences defined in the preceding paragraphs of this article; or**
- (iv) **Complicity in the commission of any of the offences defined in the preceding paragraphs of this article.**

The notion of conspiracy is found in Article 6, paragraph (a), of the Charter of the Nürnberg Tribunal and the notion of complicity in the last paragraph of the same article. The notion of conspiracy in the said Charter is limited to the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances," while the present paragraph provides for the application of the notion to all offences against the peace and security of mankind.

The notions of incitement and of attempt are found in the Genocide Convention as well as in certain national enactments on war crimes.

In including "complicity in the commission of any of the offences defined in the preceding paragraphs" among the acts which are offences against the peace and security of mankind, it is not intended to stipulate that all those contributing, in the normal exercise of their duties, to the perpetration of offences against the peace and security of mankind could, on that ground alone, be considered as accomplices in such crimes. There can be no question of punishing as accomplices in such an offence all the members of the armed forces of a State or the workers in war industries.

ARTICLE 3

The fact that a person acted as Head of State or as responsible government official does not relieve him from responsibility for committing any of the offences defined in this Code.

This article incorporates, with modifications, Article 7 of the Charter of the Nürnberg Tribunal, which article provides: "The official position of defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment."

Principle III of the Commission's formulation of the Nürnberg Principles reads: "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."

The last phrase of Article 7 of the Nürnberg Charter "or mitigating punishment" was not retained in the above-quoted principle as the question of mitigating punishment was deemed to be a matter for the competent court to decide.

ARTICLE 4

The fact that a person charged with an offence defined in this Code acted pursuant to order of his Government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him.

Principle IV of the Commission's formulation of the Nürnberg Principles, on the basis of the interpretation given by the Nürnberg Tribunal to Article 8 of its Charter, states: "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."

The observations on Principle IV, made in the General Assembly during its fifth session, have been carefully studied; no substantial modification, however, has been made in the drafting of this article which is based on a clear enunciation by the Nürnberg Tribunal. The article lays down the principle that the accused is responsible only if, in the circumstances, it was possible for him to act contrary to superior orders.

ARTICLE 5

The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence.

This article provides for the punishment of the offences defined in the Code. Such a provision is considered desirable in view of the generally accepted principle *nulla poena sine lege*. However, as it is not deemed practicable to prescribe a definite penalty for each offence, it is left to the competent tribunal to determine the penalty, taking into consideration the gravity of the offence committed.

CHAPTER V

REVIEW BY THE COMMISSION OF ITS STATUTE

60. By resolution 484 (V), adopted on 12 December 1950, the General Assembly,

"*Considering* that it is of the greatest importance that the work of the International Law Commission should be carried on in the conditions most likely to enable the Commission to achieve rapid and positive results,

"*Having regard* to certain doubts which have been expressed whether such conditions exist at the present time,

"*Requests* the International Law Commission to review its Statute with the object of making recommendations to the General Assembly at its sixth session concerning revisions of the Statute which may appear desirable, in the light of experience, for the promotion of the Commission's work."

In compliance with this request, the International Law Commission has devoted its 83rd, 96th, 97th, 112th, 113th, 129th and 133rd meetings to such a review of its Statute.

61. By way of introduction, it may be said that the members of the Commission fully share the view that the work of the Commission "should be carried on in the conditions most likely to enable the Commission to achieve rapid and positive results." It is hardly necessary for the Commission to observe that with reference to some of the matters falling within its competence—particularly some of the topics selected for codification—quick and positive results may be most difficult of achievement. Those matters require extensive research into the practice of States, the relevant materials need to be carefully weighed and evaluated, successive drafts must be discussed, and reflection concerning them cannot be unduly hurried. Expedition of the work of the Commission is a constant desideratum with its members. Yet hopes for "rapid results" are to be indulged only with appreciation of the magnitude of the task of developing or codifying international law in a satisfactory manner.

62. It is understandable that the record of the Commission over the past three years has engendered "certain doubts whether such conditions exist" as are "most likely to enable the Commission to achieve rapid and positive results" in the "progressive development of international law and its codification." It may be useful to describe briefly the conditions which "exist at the present time."

63. The members of the Commission elected in 1948 are, without exception, men engaged in professional activities. Some of them, indeed a majority, have responsibilities as permanent officials of their Governments; some of them are professors of international law in universities; some of them are engaged in the private practice of law. The Statute of the Commission does not require its members to abandon their other responsibilities, and Article 13, both in its original and in its amended text, has the effect of negating that course.

64. Over the past three years, the Commission has held one session each year. The Statute does not limit the number of sessions to be held each year. Yet more frequent sessions would necessitate a larger budget, and some members of the Commission would have difficulty in absenting themselves from the performance of other duties. For this latter reason the Commission has felt itself compelled to hold its sessions in the late spring or early summer months. The session held in 1949 continued from 12 April to 9 June; in 1950, from 5 June to 29 July; in 1951, from 16 May to 27 July—the average length of the three sessions being nine weeks. This means that the members attending the sessions have devoted, counting their travel time, about three months each year to the work of the Commission.

65. In the intervals between sessions, some members of the Commission serving as rapporteurs are called upon to devote a considerable part of their time to the work of the Commission, receiving therefor a modest honorarium. In some cases, the amount of time which such members may be able to give to the work of the Commission may be so limited as to restrict the range of their researches.

66. During each of its three sessions, the Commission has devoted much of its time, in fact more than half of it, to dealing with special assignments made by the General Assembly; the Assembly has requested the Commission to give priority to some of these. The Commission has endeavoured to comply with all of the assignments promptly. Such compliance may have had some effect in retarding the Commission's work on the topics selected for codification, with the approval of the General Assembly.

67. The Commission's review of its experience has led it to recommend to the General Assembly that in the interest of "the promotion of the Commission's work" its members to be elected in 1953 should be placed in a position which would enable them to devote their full time to the work of the Commission, and that the Statute of the Commission should be amended to provide, in line with Article 16, paragraph 1, of the Statute of the International Court of Justice, that no member of the Commission may exercise any political or administrative function, or engage in any other occupation of a professional nature. It is thought by a majority of the members of the Commission that the adoption of this recommendation would open a more favourable prospect for promoting and expediting its work.

68. The Commission appreciates that, apart from the increased financial outlay, the adoption of this recommendation may involve some difficulties in the recruitment of members. It is thought that to facilitate recruitment a longer term of office would need to be envisaged, possibly a term of six or nine years; Article 10 of the Statute now fixes a term of three years, but the General Assembly by resolution 486 (V) of 12 December 1950 has extended the term of office of the present members by two years. For the same reason, a change might also be considered in the provision in Article 12 of the present Statute that, unless a contrary decision is taken after consultation with the Secretary-General, "the Commission shall sit at the headquarters of the United Nations." Most of the present members of the Commission have a preference for Geneva over New York.

69. Taking note of the fact that a proposal for a full-time Commission made in 1947 by the Committee on the Progressive Development of International Law and its Codification (A/AC.10/51, paragraph 5 (d)), was not adopted, the Commission has given careful consideration to the possibility of presenting to the General Assembly some alternative to setting up the Commission on a full-time basis, as a method for expediting its work. An alter-

native was suggested to the Sixth Committee by the United Kingdom Delegation in 1950, namely, that some of the members of the Commission should be elected on a full-time basis. The Commission is unable to advance this alternative. It seems objectionable both because it would create an invidious distinction between the members, and because it would present insuperable difficulties in the nomination of candidates in the election; a candidate could hardly express his willingness to serve if elected, at a time when he could not know in advance whether he would be placed in the full-time or in the part-time category. Moreover, the proposed alternative might present difficulties in the application of the provision of Article 8 of the Statute that "in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured." Nor has any other alternative been found which the Commission would wish to present to the General Assembly.

70. The recommendation of a full-time Commission is placed before the General Assembly, at this time, in general terms only. If it should meet with the approval of the General Assembly in principle, the Commission would be prepared to draft—if so requested—the consequent amendments which might be introduced into its Statute. To this end, the Commission has appointed Mr. Córdova special rapporteur on this subject, to report to it at its next session. As the amendments would not have effect during the term of office of the present members which expires in 1953, they might be drafted by the Commission and considered by the General Assembly in 1952 so that they could be made applicable to the members to be elected in 1953.

71. Apart from the recommendation that, at the time of the next election of its members, the Commission should be placed on a full-time basis, the Commission has reviewed the present Statute with a view to clarification of some of its provisions, and to the introduction of greater flexibility in the procedures prescribed. It will be recalled that some difference of opinion arose at the Commission's first session in 1949 as to the proper application of Article 18, paragraph 2, of the Statute; this was explained in paragraphs 9–12 of the report covering that session.⁸ Yet on the whole the Commission is unable to say that either lack of clarity in the statutory provisions, or inflexibility of the procedures prescribed, has interfered with its achievement of "rapid and positive results." For this reason, the Commission refrains, at the present time, from submitting detailed suggestions of desirable amendments; these can be more conveniently advanced when the Commission is apprised of the General Assembly's attitude toward its fundamental recommendation as to a full-time Commission.

⁸ General Assembly, 4th Sess., Official Records, Supp. No. 10 (A/925); this JOURNAL, Supp., Vol. 44 (1950), p. 4.

CHAPTER VI

LAW OF TREATIES

72. The Commission, at its first session in 1949, selected the law of treaties as one of the topics of international law for codification and gave it priority. It elected Mr. Brierly as special rapporteur on this subject. In pursuance of Article 19, paragraph 2, of its Statute, the Commission also requested Governments to furnish it with the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the subject.

73. At the second session in 1950, Mr. Brierly submitted to the Commission a report on the law of treaties (A/CN.4/23) which contained a draft convention on the subject. The Commission had also received replies from some Governments to its questionnaire and took account of them. The Commission undertook a preliminary discussion of certain parts of this report and expressed certain tentative views thereon for the guidance of the special rapporteur.

74. At the third session of the Commission, Mr. Brierly presented a second report on the law of treaties (A/CN.4/43). In this report, the special rapporteur submitted a number of draft articles, together with comments, intended to replace certain articles which he had proposed in the draft convention contained in his report to the previous session.

75. In the course of eight meetings (namely, the 84th to 88th, and 98th to 100th meetings), the Commission considered these draft articles as well as some others contained in the first report of the special rapporteur. Various amendments were adopted and tentative texts were provisionally agreed upon (A/CN.4/L.28). These texts were referred to the special rapporteur, who was requested to present to the Commission, at its fourth session, a final draft, together with a commentary thereon. The special rapporteur was also requested to do further work on the topic of the law of treaties as a whole and to submit a report thereon to the Commission.

CHAPTER VII

REGIME OF THE HIGH SEAS

76. At its first session, held in 1949, the Commission included in the provisional list of topics selected for codification the regime of the high seas. After deciding that this topic, along with others, should be given priority, it elected Mr. François as special rapporteur on this question.

77. Mr. François' first report on this subject (A/CN.4/17) was examined at the second session of the Commission, in 1950. The Commission also had before it the replies from some Governments to a questionnaire it had circulated (A/CN.4/19, Part I, C). The special rapporteur was requested to

formulate concrete proposals on various subjects coming under the regime of the high seas. At the third session, Mr. François submitted a second report on these subjects (A/CN.4/42). It was examined by the Commission at its 113th to 125th and 130th to 134th meetings.

78. The Commission first examined the chapters of the report dealing with the continental shelf and various related subjects, namely, conservation of the resources of the sea, sedentary fisheries and contiguous zones. It decided to give to its drafts the publicity referred to in Article 16, paragraph (g) of its Statute, in particular to communicate them to Governments so that the latter could submit their comments as envisaged in paragraph (h) of the same article. The texts of the draft articles and commentaries thereon are reproduced in the Annex to the present report.*

79. On the question of nationality of ships, the Commission approved the principle underlying the special rapporteur's conclusions, namely, that States are not entirely at liberty to lay down conditions governing the nationality of ships as they think fit, but must observe certain general rules of international law on the subject. The Commission gave a first reading to concrete provisions proposed by the rapporteur.

80. With regard to penal jurisdiction in matters of collision on the high seas, the Commission decided that it was desirable to lay down a rule governing this subject, since the need for such a rule had become apparent.

81. After approving the rapporteur's proposal of including, in the codification of the regime of the high seas, rules relating to the safety of life at sea, the Commission instructed the special rapporteur to continue his researches.

82. The Commission examined the right of warships to approach foreign merchant vessels on the high seas. The special rapporteur had recognized the right of approach only where a warship has serious grounds for believing that a foreign merchant vessel is engaged in piracy, or where acts of interference are justified under powers conferred by treaty. The general treaties on the slave trade permit the right of approach only in special zones and in respect of ships below a certain tonnage. The Commission considers that, in the interests of stamping out the slave trade, the right of approach should be put on the same footing as in the case of piracy, and hence should be permissible without regard to zone or tonnage.

83. After examining the chapter of the report on submarine telegraph cables, the Commission asked the special rapporteur to deal with the subject in a general way, without going into details.

84. On the subject of hot pursuit, the Commission adopted on a first reading the conclusions proposed by the special rapporteur to supplement

* Mr. Seelle stated that he had abstained from participation in the voting on the articles concerning the continental shelf and related subjects, as he was opposed to the notion of the continental shelf on the ground that it affected the freedom of the seas.

the rules drawn up by the Codification Conference held at The Hague in 1930.

CHAPTER VIII

OTHER DECISIONS OF THE COMMISSION

INITIATION OF WORK ON ADDITIONAL TOPICS SELECTED FOR CODIFICATION

85. The Commission decided to initiate work on the topic of "Nationality, including Statelessness," which it had selected for codification at its first session. Mr. Hudson was appointed special rapporteur on this subject. In this connexion, it will be recalled that, in response to a request by the Economic and Social Council contained in its resolution 304 D (XI) of 17 July 1950, the Commission had, at its second session, decided to study the question of nationality of married women in the course of its work on the topic of "Nationality, including Statelessness."⁹ At its third session, the Commission was apprised of Economic and Social Council resolution 319 B III (XI) of 11 August 1950 requesting it to "prepare at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness." This matter lies within the framework of the topic of "Nationality, including Statelessness."

86. The Commission further decided to initiate work on the topic of "Regime of Territorial Waters," which it had, at its first session, selected for codification, and to which it had, at its second session, given priority pursuant to a recommendation contained in General Assembly resolution 374 (IV) of 6 December 1949. Mr. François was appointed special rapporteur on this topic.

87. The Secretariat was requested to assist the special rapporteurs in their preparatory work on the aforementioned topics.

EXTENSION OF THE TERM OF OFFICE OF THE PRESENT MEMBERS OF THE COMMISSION

88. The Commission took note of General Assembly resolution 486 (V) of 12 December 1950 extending the term of office of the present members of the Commission by two years, making a total period of five years from their election in 1948.

DEVELOPMENT OF A TWENTY-YEAR PROGRAMME FOR ACHIEVING PEACE THROUGH THE UNITED NATIONS

89. The Commission took note of General Assembly resolution 494(V) of 20 November 1950 and, pursuant to paragraph 2 thereof, gave consideration to point 10 of the "Memorandum of points for consideration in the de-

⁹ General Assembly, 5th Sess., Official Records, Supp. No. 12 (A/1316), par. 20; this JOURNAL, Supp., Vol. 44 (1950), p. 110.

velopment of a twenty-year programme for achieving peace through the United Nations" (A/1304) submitted by the Secretary-General. As will be seen from the present report as well as from its previous reports to the General Assembly, the Commission is making every effort to speed up its work for the progressive development and codification of international law.

CO-OPERATION WITH OTHER BODIES

90. The Commission again gave consideration to the question of co-operation with other bodies envisaged in Articles 25 and 26 of its Statute. It was highly gratified by the willingness expressed by many international and national organizations specially interested in international law to co-operate with the Commission in its work. Indeed, such co-operation has already been of great aid to the Commission; reports and studies supplied to the Commission by a number of such organizations have been of great value in the course of the Commission's work, particularly that on the regime of the high seas. It has become apparent that in the future the Commission will need to rely even to a greater extent on the contributions which are being made by non-official groups.

DATE AND PLACE OF THE FOURTH SESSION

91. The Commission decided to hold its fourth session in Geneva, Switzerland. This session, which will last some ten weeks, will begin about 1 June 1952, the exact date being left to the discretion of the Chairman of the Commission in consultation with the Secretary-General.

ANNEX

DRAFT ARTICLES ON THE CONTINENTAL SHELF AND RELATED SUBJECTS

PART I. CONTINENTAL SHELF

ARTICLE 1

As here used, the term "continental shelf" refers to the sea bed and subsoil of the submarine areas contiguous to the coast, but outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea bed and subsoil.

1. This article explains the sense in which the term "continental shelf" is used for present purposes. It departs from the geological concept of that term. The varied use of the term by scientists is in itself an obstacle to the adoption of the geological concept as a basis for legal regulation of the problem.

2. There was yet another reason why the Commission decided not to adopt the geological concept of the continental shelf. The mere fact that the existence of a continental shelf in the geological sense might be questioned in respect of submarine areas where the depth of the sea would nevertheless permit exploitation of the subsoil in the same way as

if there were a continental shelf, could not justify the application of a discriminatory legal system to these "shallow waters."

3. The Commission considered whether it ought to use the term "continental shelf" or whether it would not be preferable, in accordance with an opinion expressed in some scientific works, to refer to such areas merely as "submarine areas." It was decided to retain the term "continental shelf" because it is in current use and because the term "submarine areas" used alone would give no indication of the nature of the submarine areas in question.

4. The word "continental" in the term "continental shelf" as here used does not refer exclusively to continents. It may apply also to islands to which such submarine areas are contiguous.

5. With regard to the delimitation of the continental shelf the Commission emphasizes the limit expressed in the following words in Article 1: "... where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea bed and subsoil." It follows that areas in which exploitation is not technically possible by reason of the depth of the waters are excluded from the continental shelf here referred to.

6. The Commission considered the possibility of adopting a fixed limit for the continental shelf in terms of the depth of the superjacent waters. It seems likely that a limit fixed at a point where the sea covering the continental shelf reaches a depth of 200 metres would at present be sufficient for all practical needs. This depth also coincides with that at which the continental shelf, in the geological sense, generally comes to an end and the continental slope begins, falling steeply to a great depth. The Commission felt, however, that such a limit would have the disadvantage of instability. Technical developments in the near future might make it possible to exploit resources of the sea bed at a depth of over 200 metres. Moreover, the continental shelf might well include submarine areas lying at a depth of over 200 metres but capable of being exploited by means of installations erected in neighbouring areas where the depth does not exceed this limit. Hence the Commission decided not to specify a depth-limit of 200 metres in Article 1. The Commission points out that it is not intended in any way to restrict exploitation of the subsoil of the sea by means of tunnels driven from the main land.

7. The Commission considered the possibility of fixing both minimum and maximum limits for the continental shelf in terms of distance from the coast. It could find no practical need for either, and it preferred to confine itself to the limit laid down in Article 1.

8. It was noted that claims have been made up to as much as 200 miles; but as a general rule the depth of the waters at that distance from the coast does not admit of the exploitation of the natural resources of the subsoil. In the opinion of the Commission, fishing activities and the conservation of the resources of the sea should be dealt with separately from the continental shelf (see Part II below).

9. The continental shelf referred to in this article is limited to submarine areas outside territorial waters. Submarine areas beneath territorial waters, are, like the waters above them, subject to the sovereignty of the coastal State.

10. The text of the article emphasizes that the continental shelf in-

cludes only the sea bed and subsoil of submarine areas, and not the waters covering them (see Article 3).

ARTICLE 2

The continental shelf is subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources.

1. In this article the Commission accepts the idea that the coastal State may exercise control and jurisdiction over the continental shelf, with the proviso that such control and jurisdiction shall be exercised solely for the purpose stated. The article excludes control and jurisdiction independently of the exploration and exploitation of the natural resources of the sea bed, and subsoil.

2. In some circles it is thought that the exploitation of the natural resources of submarine areas should be entrusted, not to coastal States, but to agencies of the international community generally. In present circumstances, however, such internationalization would meet with insurmountable practical difficulties, and it would not ensure the effective exploitation of the natural resources which is necessary to meet the needs of mankind. Continental shelves exist in many parts of the world; exploitation will have to be undertaken in very diverse conditions, and it seems impracticable at present to rely upon international agencies to conduct the exploitation.

3. The Commission is aware that exploration and exploitation of the sea bed and subsoil, which involve the exercise of control and jurisdiction by the coastal State, may to a limited extent affect the freedom of the seas, particularly in respect of navigation. Exploration and exploitation are permitted because they meet the needs of the international community. Nevertheless, it is evident that the interests of shipping must be safeguarded, and it is to that end that the Commission has formulated Article 6.

4. It would seem to serve no purpose to refer to the sea bed and subsoil of the submarine areas in question as *res nullius*, capable of being acquired by the first occupier. That conception might lead to chaos, and it would disregard the fact that in most cases the effective exploitation of the natural resources will depend on the existence of installations on the territory of the coastal State to which the submarine areas are contiguous.

5. The exercise of the right of control and jurisdiction is independent of the concept of occupation. Effective occupation of the submarine areas in question would be practically impossible; nor should recourse be had to a fictional occupation. The right of the coastal State under Article 2 is also independent of any formal assertion of that right by the State.

6. The Commission has not attempted to base on customary law the right of a coastal State to exercise control and jurisdiction for the limited purposes stated in Article 2. Though numerous proclamations have been issued over the past decade, it can hardly be said that such unilateral action has already established a new customary law. It is sufficient to say that the principle of the continental shelf is based upon

general principles of law which serve the present-day needs of the international community.

7. Article 2 avoids any reference to "sovereignty" of the coastal State over the submarine areas of the continental shelf. As control and jurisdiction by the coastal State would be exclusively for exploration and exploitation purposes, they cannot be placed on the same footing as the general powers exercised by a State over its territory and its territorial waters.

ARTICLE 3

The exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of the superjacent waters as high seas.

ARTICLE 4

The exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of the airspace above the superjacent waters.

The object of Articles 3 and 4 is to make it perfectly clear that the control and jurisdiction which may be exercised over the continental shelf for the limited purposes stated in Article 2 may not be extended to the superjacent waters and the airspace above them. While some States have connected the control of fisheries and the conservation of the resources of the waters with their claims to the continental shelf, it is thought that these matters should be dealt with independently (see Part II below).

ARTICLE 5

Subject to the right of a coastal State to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the exercise by such coastal State of control and jurisdiction over the continental shelf may not exclude the establishment or maintenance of submarine cables.

1. It must be recognized that in exercising control and jurisdiction under Article 2, a coastal State may adopt measures reasonably connected with the exploration and exploitation of the subsoil, but it may not exclude the laying of submarine cables by non-nationals.

2. The Commission considered whether this provision should be extended to pipelines. If it were decided to lay pipelines on the continental shelf of another country, the question would be complicated by the fact that pumping stations would have to be installed at certain points, and these might hamper the exploitation of the subsoil more than cables. Since the question does not appear to have any practical importance at the present time, and there is no certainty that it will ever arise, it was not thought necessary to insert a special provision to this effect.

ARTICLE 6

(1) The exploration of the continental shelf and the exploitation of its natural resources must not result in substantial interference with navigation

or fishing. Due notice must be given of any installations constructed, and due means of warning of the presence of such installations must be maintained.

(2) Such installations shall not have the status of islands for the purpose of delimiting territorial waters, but to reasonable distances safety zones may be established around such installations, where the measures necessary for their protection may be taken.

1. It is evident that navigation and fishing on the high seas may be hampered to some extent by the presence of installations required for the exploration and exploitation of the subsoil. The possibility of interference with navigation and fishing on the high seas could only be entirely avoided if the subsoil could be exploited by means of installations situated on the coast or in territorial waters; in most cases, however, such exploitation would not be practicable. Navigation and fishing must be considered as primary interests, so that the exploitation of the subsoil could not be permitted if it resulted in substantial interference with them. For example, in narrow channels essential for navigation, the claims of navigation should have priority over those of exploitation.

2. Interested parties, *i.e.*, not only governments but also groups interested in navigation and fishing, should be duly notified of the construction of installations, so that these may be marked on charts. Wherever possible, notification should be given in advance. In any case, the installations should be equipped with warning devices (lights, audible signals, radar, buoys, etc.).

3. The responsibility for giving notification and warning, referred to in the last sentence of paragraph (1) of this article, is not restricted to installations set up on regular sea lanes. It is a general duty devolving on States regardless of the place where such installations are situated.

4. While an installation could not be regarded as an island or elevation of the sea bed with territorial waters of its own, the coastal State might establish narrow safety zones encircling it. The Commission felt that a radius of 500 metres would generally be sufficient, though it was not considered advisable to specify any definite figure.

ARTICLE 7

Two or more States to whose territories the same continental shelf is contiguous should establish boundaries in this area of the continental shelf by agreement. Failing agreement, the parties are under the obligation to have the boundaries fixed by arbitration.

1. Where the same continental shelf is contiguous to the territories of two or more adjacent States, the drawing of boundaries may be necessary in the area of the continental shelf. Such boundaries should be fixed by agreement among the States concerned. It is not feasible to lay down any general rule which States should follow; and it is not unlikely that difficulties may arise. For example, no boundary may have been fixed between the respective territorial waters of the interested States, and no general rule exists for such boundaries. It is

proposed therefore that if agreement cannot be reached and a prompt solution is needed, the interested States should be under an obligation to submit to arbitration *ex aequo et bono*. The term "arbitration" is used in the widest sense, and includes possible recourse to the International Court of Justice.

2. Where the territories of two States are separated by an arm of the sea, the boundary between their continental shelves would generally coincide with some median line between the two coasts. However, in such cases the configuration of the coast might give rise to difficulties in drawing any median line, and such difficulties should be referred to arbitration.

PART II. RELATED SUBJECTS

Resources of the Sea

ARTICLE 1

States whose nationals are engaged in fishing in any area of the high seas may regulate and control fishing activities in such area for the purpose of preserving its resources from extermination. If the nationals of several States are thus engaged in an area, such measures shall be taken by those States in concert; if the nationals of only one State are thus engaged in a given area, that State may take such measures in the area. If any part of an area is situated within 100 miles of the territorial waters of a coastal State, that State is entitled to take part on an equal footing in any system of regulation, even though its nationals do not carry on fishing in the area. In no circumstances, however, may an area be closed to nationals of other States wishing to engage in fishing activities.

ARTICLE 2

Competence should be conferred on a permanent international body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them. Such body should also be empowered to make regulations for conservatory measures to be applied by the States whose nationals are engaged in fishing in any particular area where the States concerned are unable to agree amongst themselves.

1. The question of conservation of the resources of the sea has been coupled with the claims to the continental shelf advanced by some States in recent years, but the two subjects seem to be quite distinct, and for this reason they have been separately dealt with.

2. Protection of marine fauna against extermination is called for in the interests of safeguarding the world's food supply. The States whose nationals carry on fishing in a particular area have therefore a special responsibility, and they should agree among them as to the regulations to be applied in that area. Where nationals of only one State are thus engaged in an area, the responsibility rests with that State. However, the exercise of the right to prescribe conservatory

measures should not exclude newcomers from participation in fishing in any area. Where a fishing area is so close to a coast that regulations or the failure to adopt regulations might affect the fishing in the territorial waters of a coastal State, that State should be entitled to participate in drawing up regulations to be applied even though its nationals do not fish in the area.

3. This system might prove ineffective if the interested States were unable to reach agreement. The best way of overcoming the difficulty would be to set up a permanent body which, in the event of disagreement, would be competent to submit rules which the States would be required to observe in respect of fishing activities by their nationals in the waters in question. This matter would seem to lie within the general competence of the United Nations Food and Agriculture Organization.

4. The pollution of waters of the high seas presents special problems, not only with regard to the conservation of the resources of the sea but also with regard to the protection of other interests. The Commission noted that the Economic and Social Council has taken an initiative in this matter (Resolution 298 C (XI), of 12 July 1950).

5. The Commission discussed a proposal that a coastal State should be empowered to lay down conservatory regulations to be applied in a zone contiguous to its territorial waters, pending the establishment of the body referred to in paragraph 3. Such regulations would as far as possible have to be drawn up in agreement with the other States interested in the fishing grounds in question. They would make no distinction between the nationals of the various States, including the coastal State. Any disputes arising out of the application of the rules would have to be submitted to arbitration. The figure of 200 sea miles was suggested as the breadth of the zone. In view of the fact that there was an equality of votes concerning the desirability of this proposal, the Commission decided to mention it in its report without sponsoring it.

Sedentary Fisheries

ARTICLE 3

The regulation of sedentary fisheries may be undertaken by a State in areas of the high seas contiguous to its territorial waters, where such fisheries have long been maintained and conducted by nationals of that State, provided that non-nationals are permitted to participate in the fishing activities on an equal footing with nationals. Such regulation will, however, not affect the general status of the areas as high seas.

1. The Commission considers that sedentary fisheries should be regulated independently of the problem of the continental shelf. The proposals relating to the continental shelf are concerned with the exploitation of the mineral resources of the subsoil, whereas, in the case of sedentary fisheries, the proposals refer to fisheries regarded as sedentary because of the species caught or the equipment used, *e.g.* stakes embedded in the sea floor. This distinction justifies a division of the two problems.

2. Sedentary fisheries can give rise to legal difficulties only where such fisheries are situated beyond the outer limit of territorial waters.

3. Banks where there are sedentary fisheries, situated in areas contiguous to but seaward of territorial waters, have been regarded by some coastal States as under their occupation and as forming part of their territory. Yet this has rarely given rise to complications. The Commission has avoided referring to such areas as "occupied" or "constituting property." It considers, however, that the special position of such areas justifies special rights being recognized as pertaining to coastal States whose nationals have been carrying on fishing there over a long period.

4. The special rights which the coastal State may exercise in such areas must be strictly limited to such rights as are essential to achieve the ends in respect of which they are recognized. Except for the regulation of sedentary fisheries, the waters covering the sea bed where the fishing grounds are located remain subject to the regime of the high seas. The existing rule of customary law by which nationals of other States are at liberty to engage in such fishing on the same footing as the nationals of the coastal State, should continue to apply.

Contiguous Zones

ARTICLE 4

On the high seas adjacent to its territorial waters, a coastal State may exercise the control necessary to prevent the infringement, within its territory or territorial waters, of its customs, fiscal or sanitary regulations. Such control may not be exercised more than twelve miles from the coast.

1. International law does not prohibit States from exercising a measure of protective or preventive jurisdiction for certain purposes over a belt of the high seas contiguous to its territorial waters, without extending the seaward limits of those waters.

2. Many States have adopted the principle of a high sea zone contiguous to territorial waters, where the coastal State exercises control for customs and fiscal purposes, to prevent the infringement of the relevant laws within its territory or territorial waters. In the Commission's view it would be impossible to challenge the right of States to establish such a zone. However, there may be doubt as to the extent of the zone. To ensure as far as possible the necessary uniformity, the Commission is in favour of fixing the breadth of the zone at 12 nautical miles measured from the coast, as proposed by the Preparatory Committee of the Hague Codification Conference (1930). It may be, however, that in view of the technical developments which have increased the speed of vessels, this figure is insufficient. A further point is that until such time as there is unanimity in regard to the breadth of territorial waters, the zone should invariably be measured from the coast and not from the outer limit of territorial waters. The States which have claimed extensive territorial waters have in fact less need of a contiguous zone than those which have been more modest in their delimitation.

3. Although the number of States which claim a contiguous zone for the purpose of sanitary regulations is fairly small, the Commission believes that in view of the connexion between customs and sanitary regulations, the contiguous zone of 12 miles should be recognized for the purposes of sanitary control as well.

4. The proposed contiguous zones are not intended for purposes of security or of exclusive fishing rights. In 1930, the Preparatory Committee of the Codification Conference found that the replies from Governments offered no prospect of reaching agreement to extend beyond territorial waters the exclusive rights of coastal States in the matter of fishing. The Commission considers that in that respect the position has not changed.

5. The recognition of special rights to the coastal State in a zone contiguous to its territorial waters for customs, fiscal and sanitary purposes would not affect the legal status of the airspace above such a zone. Air traffic control may necessitate the establishment of an air zone over which a coastal State may exercise control. This problem does not, however, come within the regime of the high seas.

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